143 U.S. 202

No. 1517

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TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

OCTOBER TERM, 1891.

No. ~~18.~~ 1511

JOHN WOODS AND STEPHEN B. LOVEJOY, PARTNERS AS WOODS AND LOVEJOY, PLAINTIFFS IN ERROR,

vs.

AUGUST LINDVALL, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

UNITED STATES CIRCUIT COURT OF APPEALS,

EIGHTH CIRCUIT.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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1 Pleas in the United States circuit court of appeals for the eighth circuit, at a term thereof begun and holden at the United States court-house, in the city of St. Louis, Missouri, in the eighth circuit, on the second Monday of October, it being the 12th day of October, 1891, before the Honorable Henry C. Caldwell, Honorable Moses Hallett, and Honorable Amos M. Thayer, judges of said court.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN, *Clerk.*

2 Be it remembered that heretofore, to wit, on the 29th day of August, 1891, a transcript of record, in pursuance to a writ of error to the circuit court of the United States for the district of Minnesota, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein John Woods and Stephen B. Lovejoy, partners as Woods and Lovejoy, were plaintiffs in error and August Lindvall was defendant in error; which said transcript of record from the circuit court of the United States for the district of Minnesota is in the words and figures following, to wit:

3 United States Circuit Court, District of Minnesota, Third Division.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN B. LOVEJOY, Defendants.

Petition for Writ of Error.

To Hon. R. R. Nelson, judge of the circuit court of the United States in an- for the district of Minnesota:

The petition of John Woods and Stephen B. Lovejoy, partners as Wood & Lovejoy, shows and states—

That as judgment in the above-entitled action was rendered against them as defendants and in favor of August Lindvall as plaintiff in the above-entitled action, at the last January term of the said court, on the 11th day of February, A. D. 1891, for the sum of three thousand eight hundred ($3,800) dollars, for damages, and costs in the sum of one hundred forty-two and $\frac{15}{100}$ dollars additional thereto; and these petitioners, feeling aggrieved by the said judgment, have, as required by statute in such cases made and provided, filed in this court their assignment of errors and herewith present their supersedeas bond, which they pray your honor may approve and allow your petitioners a writ of error herein.

SHAW & CRAY,
Attorneys for said Petitioners.

Dated July 30th, A. D. 1891.

The foregoing writ of error is allowed, and, the proper bond having been given and approved, the same is hereby made a supersedeas.

R. R. NELSON,
Judge Circuit Court.

Dated July 30th, A. D. 1891.

Indorsed: Petition for writ of error.

UNITED STATES OF AMERICA, *District of Minnesota*, } ss:

In obedience to the command of the within writ I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within case, with all things concerning the same.

Seal of the U. S. Circuit Court, District Minnesota, Third Division.

In witness whereof I hereto subscribe my name and affix the seal of the circuit court of the United States in and for the district of Minnesota.

OSCAR B. HILLIS,
Clerk of the U. S. Circuit Court.

4 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the January term, 1891, thereof, between August Lindvall, as plaintiff, and John Woods and Stephen Lovejoy, partners as Woods & Lovejoy, as defendants, a manifest error hath happened, to the great damage of the said John Woods and Stephen Lovejoy, partners as Woods & Lovejoy, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then and under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 28th day of September, 1891, to the end that, the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause farther to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of July, in the year of our Lord one thousand eight hundred and ninety-one (1891).

Seal of the U. S. Circuit Court, District of Minnesota, Third Division.

Issued at my office, in St. Paul, Minnesota, with the seal of the circuit court of the United States for the district of Minnesota, and dated as aforesaid.

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States for the District of Minnesota.

Allowed by—

R. R. NELSON,
Judge of the Circuit Court.

5 United States Circuit Court, District of Minnesota, Third Division.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods & Lovejoy, Defendants.

Know all men by these presents that we, John Woods, for and on his own behalf and on behalf of Stephen B. Lovejoy, as principal, and Lorenzo D. Day and Abram J. Drew, as sureties, all of Minneapolis, Hennepin county, Minnesota, are held and firmly bound unto August Lindvall in the full and just sum of six thousand dollars, to be paid to the said August Lindvall, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this thirtieth (30th) day of July, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at the January, A. D. 1891, term of the circuit court of the United States in and for the district of Minnesota, third division, in a suit depending in said court between August Lindvall, plaintiff, and John Woods and Stephen H. Lovejoy, partners as Wood & Lovejoy, defendants, judgment was rendered against the said defendants, and the said defendants have obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said August Lindvall, citing and admonishing said August Lindvall to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said John Woods and Stephen B. Lovejoy shall prosecute said writ of error to effect and answer all damages and costs if they fail to make good their plea, then this obligation to be void; else to remain in full force and virtue.

[SEAL.] JOHN WOODS.
[SEAL.] LORENZO D. DAY.
[SEAL.] ABRAM J. DREW.

Sealed and delivered in presence of—

W. R. CRAY.
WM. S. WINGATE.

6 STATE OF MINNESOTA, } ss:
County of Hennepin, }

Be it known that on this 30th day of July, A. D. 1891, before me personally came John Woods, Lorenzo B. Day, and Abram J. Drew, to me known to be the same persons described in and who executed the foregoing instrument, and they each and severally acknowledged the same to be his own free act and deed.

[SEAL.] WILLIAM R. CRAY,
Notary Public, Hennepin County, Minn.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Lorenzo D. Day and Abram J. Drew came before me personally, and, being duly sworn, each for himself says that he is one of the sureties named in the foregoing instrument; that he is a resident and freeholder in the State of Minnesota, and that he is worth the sum of twelve thousand dollars over and above his debts and liabilities and exclusive of his property which is exempt from execution.

LORENZO D. DAY.
ABRAM J. DREW.

Subscribed and sworn to before me on this 30th day of July, A. D. 1891.

WILLIAM R. CRAY,
Notary Public, Hennepin County, Minn.

Approved.

[SEAL.] R. R. NELSON, *Judge.*

Indorsed: Bond.

United States Circuit Court, District of Minnesota.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOOD and STEPHEN B. LOVEJOY, Partners as Wood & Lovejoy, Defendants.

Citation.

The President of the United States to August Lindvall, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States circuit court in and for the district of Minnesota, third division, at the city of St. Paul, Minnesota, wherein
7 John Woods and Stephen B. Lovejoy, partners as Woods & Lovejoy, defendants, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said

writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable R. R. Nelson, judge of the United States circuit court in and for the district of Minnesota, this 30th day of July, A. D. 1891.

R. R. NELSON,
Judge of U. S. Circuit Court in and for District of Minnesota.

Indorsed: United States circuit court, district of Minnesota, third division. August Lindvall, plaintiff, *vs.* John Woods and Stephen B. Lovejoy, partners as Woods & Lovejoy, defendants. Citation.

Due service of the within citation is hereby admitted this 30th day of July, A. D. 1891.

AUGUST LINDVALL,
Defendant in Error.
ARCTANDER & ARCTANDER,
Attorneys for Defendant in Error.

UNITED STATES OF AMERICA:

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods & Lovejoy, Defendants.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, of the June term, A. D. 1890, of said court, held in the city of St. Paul, in said district, in the year 1890.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this 11th day of September came the plaintiff, by his attorneys, and filed in the clerk's office of said court his bill of complaint in words and figures as follows, to wit:

8 In United States Circuit Court, District of Minnesota.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods & Lovejoy, Defendants.

Complaint.

Plaintiff for complaint herein alleges—

That defendants during all the times hereinafter mentioned were, always have been, and still are citizens of the State of Minnesota, but that plaintiff, although a resident of the State of Minnesota, is not and never was a citizen of the said State of Minnesota, but that, on the contrary, the plaintiff is and always has been an alien and subject of his majesty the King of Sweden and Norway.

That the defendants during all the times hereinafter mentioned

were and still are partners in business as railroad contractors under and by the firm name and style of Woods & Lovejoy.

That Aleck Murdock during all the times hereinafter mentioned was the general superintendent of the defendants as such partners, and as such had full, general, and exclusive management and control of the employés of the said defendants as such partners and of the business and work of the defendants as such partners in and about laying and building a certain railroad track near Gladstone, Minnesota, on the St. Paul and Duluth railroad, and at all of said times was the vice-principal and representative of said defendants as such partners.

That heretofore, to wit, on or about the 1st day of April, 1888, the plaintiff was employed by and entered into the service of the defendants as such partners as a common laborer for the purpose of unloading dumping cars for the defendants as such partners on the said track and grade of said railroad company then being built by said defendants as such partners and for no other different purpose whatsoever.

That it was the duty of the defendants as such partners to furnish this plaintiff with a safe place in which to work and with the proper appliances with which to work in his said employment and not to expose plaintiff to any unnecessary or unreasonable dangers or risks; and it was further their duty to make and provide proper and safe plans of the method of doing said work in which defendants were then and there engaged in a reasonable safe manner and with due regard to the safety of plaintiff and all other persons engaged in said work.

That while plaintiff was so engaged in said service and work of unloading dumping cars at the dump of said grade near Gladstone, Minnesota, to wit, on the 26th day of April, 1888, the plain-
9 tiff was by the said general manager and superintendent of the said defendants as such partners employed to manage, direct, and superintend the business and affairs of the defendants as such partners in and about such railroad track aforementioned ordered and directed to go from the dump where he was then at work unloading the said dumping cars onto a trestle-work built and erected by said defendants as such partners, and which said trestle-work was by said defendants carelessly and negligently built and erected in a careless and slovenly manner and without the proper fastenings and braces, and he was then and there by the said general manager and superintendent ordered and directed, while standing on said trestle-work, to push large and heavy timbers and stringers out beyond the trestles already erected, contrary to the special engagement of plaintiff, and of which work the said plaintiff was unversed and unexperienced, and which fact was well known to said superintendent and manager of said defendants and to said defendants as such partners, and the said work to which plaintiff was directed was greatly more dangerous than the work for which plaintiff was hired and employed.

That the said place to which plaintiff was by the said defendants as such partners directed to go and where he was directed and

ordered to push said heavy timbers and stringers was unsafe and dangerous and so well known to the defendants as such partners.

That the person employed and put by defendants as such partners to build and erect such trestle-work was not a carpenter, to defendants' knowledge, and was wholly incompetent and unversed in building and erecting trestles and in the proper mode of construction of such trestle-work and was during all of said time wholly incompetent and unfit for said work, and that all of the same was well known to defendants during all of the time he was so employed by the defendants, but the same was not known to plaintiff, and that nevertheless defendants not only carelessly put him to said work of building and erecting trestles, but so carelessly retained him at the same without giving him either proper or any instructions as to how such work should be done.

That the said trestle-work was so carelessly and negligently built and erected by the defendants as such partners, by reason of the said trestles or uprights not being either braced or counterbraced nor imbedded in the ground nor in any way fastened together, that when the plaintiff went onto the same, as directed by said defendants and their superintendent, and attempted to push stringers or heavy timbers which he was directed to push, all of said trestle-work tumbled down, and the plaintiff was, without any fault or negligence on his part, precipitated from the top of said trestle-work to the ground, a distance of 21 feet, and received thereby great and serious injuries, to wit, that plaintiff's right leg was broken and fractured in different places; that plaintiff's right arm was broken and fractured; that plaintiff's head was fractured and injured, and he was made entirely blind in one eye and lost a portion of his eyesight on the other eye, and that his hearing has been considerably impaired.

That plaintiff is informed and believes that said injuries are permanent; that he is informed and believes in the course of time he will become entirely blind and lose his hearing entirely.

That plaintiff at the same time received other internal injuries, the exact nature of which he cannot now state, and that he was by such negligence and carelessness of the defendants as such partners terribly and permanently injured and damaged.

That from said injuries so received plaintiff has suffered great and severe pains of body and mind; that in attempting to be cured of said injuries plaintiff has necessarily incurred, in services of physicians and nurses and in purchasing medicine, liabilities to the amount of $300.

That at the time of the said injuries plaintiff was a laboring man and able to earn as such laboring man the sum of $2 per day; that ever since said injuries plaintiff has been unable by reason of the same to work or earn anything, and that he is informed and believes that he for all time to come will be unable to do any work or earn anything by reason of his said injuries, to his damage in the sum of $10,000.

That by reason of the premises plaintiff has suffered damages

over and above the special damages hereinbefore alleged in the sum of $20,000; that no part of the same has ever been paid.

Wherefore plaintiff demands judgment against the defendants and each of them for the sum of $30,300, together with the costs and disbursements of this action.

ARCTANDER & ARCTANDER,
Plaintiff's Attorneys, 117–122 *Rochester Block*,
Minneapolis, Minn.

STATE OF MINNESOTA, } ss.
County of Hennepin, }

August Lindvall came before me personally, and, being duly sworn, doth say that he is the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters that he believes — to be true.

AUGUST LINDVALL.

11 Subscribed and sworn to before me on this 11th day of September, A. D. 1889.

[NOTARIAL SEAL.] JNO. W. ARCTANDER,
Notary Public, Hennepin Co., Minn.

Indorsed: Complaint. Filed September 11th, 1889. Oscar B. Hillis, clerk.

And afterwards, to wit, on the same day, summons was issued in words and figures as follows, to wit:

(Original.)

UNITED STATES OF AMERICA, } ss:
District of Minnesota, Third Division, }

In the Circuit Court of the United States for the District of Minnesota.

AUGUST LINDVALL
vs.
JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods & Lovejoy.

Summons.

The President of the United States of America to the defendant above named, Greeting:

You are hereby summoned and required to answer the complaint in this action, which has been filed in the office of the clerk of this circuit court, in Saint Paul, county of Ramsey, and State of Minnesota, and file your answer in said clerk's office within twenty days after the service hereof, excluding the day of such service, and if you fail to answer the complaint as aforesaid the plaintiff will have the amount he is entitled to recover ascertained by the court or under its direction and take judgment against you for the

amount so ascertained, besides the costs and disbursements of this action.

For the marshal of the district of Minnesota to execute.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 11th day of September, A. D. 1889. Issued at my office, in the city of St. Paul, under the seal of said circuit court, the day and year last aforesaid.

[SEAL OF COURT.] OSCAR B. HILLIS, *Clerk*,
By L. P. RICHARDSON, *Deputy*.

ARCTANDER & ARCTANDER,
Plaintiff's Attorneys.

12 United States Circuit Court, District of Minnesota, Third Division.

AUGUST LINDVALL, Plaintiff,
vs.
WOOD & LOVEJOY, Defendants. } Summons. Original.

Filed September 13th, 1889. Oscar B. Hillis, clerk. Arctander & Arctander, plaintiff's attorneys.

DISTRICT OF MINNESOTA:

After due and diligent search I fail to find John Woods, one of the defendants named in the annexed summons, within the district.

W. M. CAMPBELL,
U. S. Marshal,
By A. B. BRACKETT, *Deputy*.

Marshal's fees, $4.60.

UNITED STATES OF AMERICA, } *ss*:
District of Minnesota, }

I hereby certify that I have served the annexed summons on the *the* therein-named defendants, Woods & Lovejoy, by serving Stephen Lovejoy, a partner, by handing to and leaving a true copy thereof for him with Mrs. S. B. Lovejoy, his wife, an adult person, then a member of and resident in the family, at the usual place of abode of the said Stephen Lovejoy, at Minneapolis, in said district, on the 12th day of September, 1889.

W. M. CAMPBELL,
U. S. Marshal,
By A. B. BRACKETT, *Deputy*.

UNITED STATES OF AMERICA, } *ss*:
District of Minnesota, }

I hereby certify that I have served the annexed summons on the therein-named defendants, Stephen Lovejoy, by handing to and leaving a true copy there*for* for him with Mrs. S. B. Lovejoy, an adult person, then a member of and resident in the family, at the

usual place of abode of the said Stephen Lovejoy, at Minneapolis, in said district, on the 12th day of September, 1889.

W. M. CAMPBELL,
U. S. Marshal,
By A. B. BRACKETT, *Deputy.*

13 And afterwards, to wit, on the 2d day of October, came the defendants, by their attorneys, and filed in the clerk's office their answer to plaintiff's bill of complaint in words and figures as follows, to wit:

United States Circuit Court, District of Minnesota.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods & Lovejoy, Defendants.

Answer.

The defendants above named, answering unto the complaint of the above-named plaintiff herein—

Admit that said defendants are citizens of the State of Minnesota, and further admit the partnership of said defendants, the general nature of their business, and the firm name and style of such partnership as in said complaint alleged; admit and allege that throughout the month of April, A. D. 1888, for a long time prior and subsequent thereto, said defendants as such partners were engaged in and upon railroad work as contractors, and as such contractors were constructing a portion of a line of railway for the St. Paul and Duluth Railway Company at or near the location in said complaint mentioned.

As to all that part of said complaint wherein it is alleged that said plaintiff is a resident of the said State of Minnesota, but that he is not now and never was a citizen of said State, but that he is and always has been an alien and a subject of his majesty the King of Sweden and Norway, defendants allege that they have not nor has either of them any knowledge or information sufficient to form a *a* belief.

Allege that on or about the first day of April, A. D. 1888, said plaintiff, as a common laborer, was employed by and was engaged in the employment of said defendants in and about their work in and upon the construction of said portion of said line of railroad as a general helper and a common laborer, with other common laborers and coservants employed by said defendants, to shovel, grade, load and unload dumping cars, to hoist piles, arrange and put in place such trestle-work from time to time as might be required in the progress of said work, and in general to do and pe-form all work and labor necessary, usual, or incident to said employment and said work upon which they were then and there engaged, and that on or about the said last-named day said plaintiff, under and pursuant to

said employment and hiring, entered upon said work and labor for said defendants, and that he thus continued to be engaged and employed until on or about the 20th day of April, A. D. 1888.

14 Deny that Alex. Murdock, named in said complaint, was at the times in said complaint mentioned or at any time vice-principal, general superintendent, or general manager of or for said defendants or of their business affairs or work or any part thereof, or that he then or at any time was any superintendent, vice-principal, representative, or manager for them whatsoever, except that they allege that he was a foreman of and colaborer with said plaintiff and certain other colaborers and coservants, as hereinafter set forth, and not otherwise, and was during all said time engaged upon the same work and labor as said plaintiff and said certain other coservants and co-employés of defendants upon said work.

Answering unto all that portion of said complaint from and including the words "that while" in the eighth (8th) line of page two (2) of said complaint to and including the words and figures "of 21 feet" in the sixteenth (16th) line of page three (3) thereof, being all that portion of said complaint alleging a description of trestle-work and an account of its fall and of an alleged fall of said plaintiff, these defendants allege the facts to be that on or about the 20th day of April, A. D. 1888, said plaintiff and certain other common colaborers and coservants, namely, one John B. Johnson and other persons, all of whom then and there were coservants and colaborers of said plaintiff and engaged in the same business, labor, and occupation as such colaborers and employés of said defendants, were, under and pursuant to their employment and hiring, engaged in the raising to place and connecting by stringers and other braces and fastenings to certain trestle-work theretofore by said plaintiff and his said colaborers and coservants erected and constructed at or near the location in said complaint mentioned, the character of which, as well as its mode of construction, were well known to plaintiff, a certain bent or section of said trestle-work which was then and there necessary for and to be used in and as a part of said construction of said portion of said line of railroad; that said plaintiff and his said colaborers and co-employés had raised said bent or section to nearly the position in which they were seeking to place the same, and were then and there adjusting the same in the place where it should remain in the permanent construction of said work, and then and there were extending thereto from the top of that portion of said trestle-work already completed by them, said plaintiff and his said colaborers and coservants, timbers to be used thereon as stringers which they, said plaintiff and said other colabors and coservants, co-employés of said defendants, had placed in position thereon, and had assumed and undertaken properly and securely to adjust and fasten for said purpose; that while thus engaged and at work a portion of said trestle-work theretofore and already hoisted and put in position by said plaintiff and his said colaborers and coservants gave way and fell over, and that said plaintiff, who was then and there on the

15 top thereof, fell with it; but in respect to the distance of said

fall and as to whether said plaintiff was precipitated or fell the distance of twenty-one feet to the ground these defendants allege that they have not any knowledge or information sufficient to form a belief, except that they allege that the trestle-work at such location was not to exceed twenty-one feet in height; and defendants expressly deny that the falling of said portion of said trestle and the fall of said plaintiff was due or attributable to any carelessness or negligence by or on the part of said defendants or either of them or for want of sufficient or suitable timber or other materials for said work and said construction or of suitable, proper, and sufficient instruments and tools for use in and about the same, and further expressly deny that the giving away or fall of said trestle-work was occasioned or brought about by any act, neglect, or omission on the part of these defendants or either of them, but, on the contrary thereof, they allege that defendants did then and there provide and furnish, and at all times have provided and furnished, sufficient and suitable timber and other materials, tools, and instruments for the construction and purposes of their said work and the construction of said trestle and for all uses and purposes connected with their said work and business, and have frequently and at all times warned and admonished their coservants and co-employés, and particularly this plaintiff, to exercise all necessary caution and care in and about their said work and to so proceed in and about the same as to avoid all possible occasion or chance for injury or accident.

Answering unto each and every allegation in said complaint contained from and including the words "and received thereby" in the sixteenth and seventeenth lines of page three (3) of said complaint to the end of said complaint, defendants allege that they have not any knowledge or information sufficient to form a belief as to said allegations or any thereof or any part thereof, except that they allege that they are informed and believe it to be true and upon their information and belief allege that said plaintiff was to some extent injured by a fall while upon some portion of said trestle-work, but as to the exact extent or character of said injury they have not any knowledge or information sufficient to form a belief, and they expressly deny that any fall by or injury to said plaintiff, whether as alleged in said complaint or otherwise, was occasioned by or through any negligence or carelessnes, fault, act, or omission of these defendants or either of them, and allege that said fall and injury was due to and caused by the carelessness and negligence of said plaintiff and his coservants and colaborers in and about the construction of said trestle-work and the handling and moving of stringers and timbers thereon and the insecure and insufficient manner in which he and they fastened and adjusted the same.

16 And, further answering herein, defendants allege that the giving away and falling of said trestle and the fall of said plaintiff was caused solely by the carelessness and negligence of said plaintiff and his said colaborers and coservants and by his and their failure to properly adjust, construct, and fasten said trestle-work and stringers and the careless, negligent, and insecure manner

in which they and he had performed their work and then were undertaking to perform their work and labor in putting said section or bent of said trestle in position and in extending and moving said stringers and the timbers thereon in making said connection, and that the alleged injury to said plaintiff was caused solely by plaintiff's carelessness and negligence and by the carelessness and negligence of plaintiff's colaborers and employés in and about the same and said work and by his and their careless and negligent manner in getting upon said trestle without having properly secured and fastened the same.

And defendants further expressly deny that said plaintiff was able to earn or that he was earning at said time of said accident the sum of two dollars per day or any greater sum than one and $\frac{25}{100}$ ($1.25) dollars per day, or that plaintiff, by reason of the allegations in said complaint or otherwise, has been damaged in the sum of ten thousand dollars or in any sum whatsoever, or that he has suffered damages or injury above said alleged special damages or any damages whatsoever, by reason of the allegations in said complaint or otherwise, in the sum of twenty thousand dollars or in any sum whatsoever.

And, except as hereinbefore admitted, qualified, or specifically denied, these defendants deny each and every allegation in said complaint contained.

Second. And for a further answer and defence to said complaint defendants allege that heretofore, to wit, on or about the 24th day of July, A. D. 1888, said plaintiff, in the district court in and for the county of Hennepin, State of Minnesota, the same being then and there a court of general jurisdiction and having full jurisdiction of the action hereinafter mentioned and set forth and of said parties, commenced an action against these defendants and duly served his summons and complaint therein upon them, in which complaint said plaintiff set forth and alleged in almost the same words the same cause of action set up and sued on herein; that to said complaint these defendants duly made and served their answer, and said plaintiffs thereafter duly made and served his reply thereto; that issues were thereupon duly joined in said action, and thereupon and thereafter, said plaintiff having served his notice of trial therein and placed said cause on the calendar of said court for the December, A. D. 1888, general term thereof, *and* same came duly and regularly on for trial therein on the 5th day of February, A. D. 1889, in said term, before said court and a jury
17 duly impanelled and sworn to hear, try, and determine said cause; that the respective parties to said action were present in said court with their respective counsel on said trial, and that such proceedings were then and there duly had in said court upon the trial of said cause that said plaintiff presented his case and duly offered and submitted his evidence and proof in support of his alleged cause of action under the issues joined and duly and fully tried and submitted his said cause upon the merits thereof, and thereupon announced to said court in open court that the case by him so made and presented was all he had to offer, and that he rested

his case therewith. The said defendants thereupon moved said court then and there sitting upon the trial of said cause that said cause be dismissed and for an order of dismissal thereof upon the merits of plaintiff's said case therein made and presented upon the ground and for the reason that said plaintiff had failed to show or prove a cause of action against said defendants therein; that said court, after duly considering said plaintiff's case and the merits thereof and all the allegations therein and all the evidence and proof therein offered and advanced upon the trial thereof and hearing counsel for the respective parties upon said motion, granted said motion of said defendants and duly dismissed said plaintiff's said cause upon the merits thereof and then and there duly made and caused to be made and entered an order of dismissal of said cause upon the merits thereof; that said plaintiff requested from said court a stay of proceedings within which to prepare a case and bill of exceptions and move said court for a new trial of said cause, which request was duly granted.

That thereafter and on or about the 16th day of March, 1889, upon a settled case and bill of exceptions duly made, signed, and filed in said court in said action, duly signed, approved, and allowed as containing all the proceedings and evidence offered and adduced upon the trial of said action, said plaintiff duly served notice and brought on said cause for hearing and argument before said court upon a motion for a new trial thereof; that counsel for said respective parties were duly heard by said court upon said motion for a new trial, and said court thereupon, on the said last-named day, duly made and filed its order denying said plaintiff's motion for a new trial of said action; that thereafter and on said last-named day said plaintiff served his notice of appeal and duly appealed to the supreme court of said State of Minnesota, which last-named court then was, ever since has been, and yet is the court of last resort in and for said State of Minnesota and had full, complete, and final and appellate jurisdiction to hear and determine said cause on said appeal; that thereafter the record in said appeal was duly returned from said district court and filed in said supreme court, and that such proceedings were duly had in said supreme court on said appeal that said cause was, on the 25th day of June, A. D. 1889, duly argued and submitted upon
18 the merits by counsel for the respective parties thereto; that thereafter and on the 15th day of July, A. D. 1889, said cause on said appeal having been finally submitted to said supreme court for determination upon the merits thereof as aforesaid, said last-named court did duly make, render, enter, and file in the office of the clerk thereof its decision in writing as by law provided, wherein and whereby said supreme court did in all things affirm the order of said district court denying said plaintiff's motion for a new trial of said cause; that thereafter and on the 30th day of July, A. D. 1889, upon motion of said defendants and pursuant to notice to said plaintiff theretofore duly given and served, judgment was duly made, rendered, entered, and docketed in said cause in favor of said defendants and against said plaintiff *or* the costs and disbursements

in said appeal, and thereafter and on the 5th day of September, A. D. 1889, the usual mandate from said supreme court to said district court having been duly returned and filed in the office of the clerk of said district court under and pursuant to said mandate and the order of said court and notice theretofore duly given and served by said defendants upon said plaintiffs, judgment was duly given, made, rendered, and entered in said last-named court in favor of said defendants and against said plaintiff therein, and whereby said cause was in full and finally determined in favor of said defendants and against said plaintiff upon the merits of plaintiff's said alleged cause of action.

That by the hearing and trial of said action and the appeal therein said plaintiff's alleged cause of action therein and in the complaint herein set forth was duly and fully heard, tried, considered, and determined upon the merits thereof and said judgment therein given made, rendered, and entered in a full, complete, and final adjudication and determination thereof and of plaintiff's alleged claim therein and in his complaint herein set forth, and these defendants allege and claim the same to be a bar to said plaintiff's alleged cause of action herein and a full and final judicial determination thereof.

Wherefore defendants pray that plaintiff take nothing by his said complaint herein, and that these defendants be hence dismissed with judgment for their costs and disbursement of this action.

SHAW & CRAY,
Defendants' Attorneys.

53 Minn. Loan & Trust Co. b'ld'g, Minneapolis, Minn.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Willard Cray, came before me personally, and, being duly sworn, doth say that he is one of the attorneys for defendants in the 19 above-entitled action; that the foregoing answer is true to the best of his knowledge, information, and belief, and that the reason why this affidavit of verification is not made by said defendants or one of them is that they are each absent from the county of Hennepin, Minnesota, wherein resides this affiant and Shaw & Cray, said defendants' attorneys; and further saith not.

WILLARD R. CRAY.

Subscribed and sworn to before me on this 2nd day of October, A. D. 1889.

[NOTARIAL SEAL.] J. C. FIFIELD,
Notary Public, Hennepin Co., Minn.

Indorsed: Answer. Filed October 2d, A. D. 1889. Oscar B. Hillis, clerk.

And afterwards, to wit, on the 18th day of October, came the plaintiff, by his attorneys, and filed in the clerk's office his reply to the answer of the defendants in the words and figures as follows, to wit:

In United States Circuit Court, District of Minnesota.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods & Lovejoy, Defendants.

Reply.

Plaintiff, for reply to the answer of the defendants and the new matter therein set up, denies each and every allegation, matter, statement, or thing in said answer contained and each and every part, portion, or parcel of each and every such allegation, either in manner or form as therein set up or otherwise, save and except as hereinafter expressly and in so many words admitted or specifically denied.

Plaintiff specifically denies that he at any time whatsoever was employed by the defendants as a common laborer or for any other purpose than in his complaint mentioned, or that he ever was employed as a general helper or common laborer whatsoever.

Admits that he was employed by the defendants to shovel, grade, and unload dumping cars, but denies that he ever was employed, either alone or with other workmen, to load cars or to hoist piles or to arrange or put in place any trestle-work, either as might from time to time be required in the progress of the work of the defendants or otherwise, or that he was ever in general or otherwise employed or engaged to do or perform all work or labor necessary, usual, or incident to any employment of the defendants or to any work upon which he or any of the defendants' other employés were ever engaged, or that he ever entered upon any work for the defendants under any employment or hiring as set up in said answer or ever continued to be engaged or employed under any such employment or hiring as in said answer set up, either up to the time in said answer mentioned or otherwise.

Denies that Alex. Murdock, mentioned in said answer, was a colaborer with plaintiff or with any other colaborer or coservant, as in said answer mentioned or otherwise, or that he was during any time engaged upon the same work or labor as plaintiff or any coservants or colaborers of the plaintiff.

Denies that plaintiff at any time whatsoever, either at the time in said answer mentioned or at any time, was, either under *under* or pursuant to his employment or hiring or otherwise, engaged in raising to place or connecting by stringers or other braces or fastenings to any trestle-work whatsoever, either theretofore by plaintiff or any of his colaborers or servants erected or constructed, a certain bent or section of any trestle-work either necessary for or to be used in or as a part of the construction of any portion of any line of railroad, or that the character of said work on said trestle or the mode of construction of the same was either well or at all known to plaintiff.

Denies that any of said work in regard to raising to place or connecting by stringers or other braces or fastenings to any of said

trestle-work any certain bent or section of said trestle-work was done by any colaborer or coservant of plaintiff, or that any persons engaged in the same were such colaborers or coservants of the plaintiff, but avers that the John B. Johnson and other persons engaged in said work were employed in a different department from that in which plaintiff was employed, and that the work of raising said trestles and connecting the same was done in the manner in which it was done with the full knowledge and consent of and under the supervision of said defendants and their said superintendent, and so done carelessly and negligently in the manner in which it was done by the express order of said defendants and their superintendent.

Denies that plaintiff or any of his colaborers or co-employés had anything whatever to do with the raising of any bent or section to any position whatsoever or in adjustiug any bent or trestle in any place whatsoever, or that they or any of them had anything to do with the fastenings or braces to be provided for said trestle-work, or that plaintiff or any of his coservants had at any time completed any portion of such trestle-work, but plaintiff admits that at the time of receiving the injury he and another servant of the de-
21 fendants were, by the special and direct order of their foreman and superior, whose orders plaintiff was bound to obey, engaged in extending from the top of the portion of the trestle-work already completed by defendants certain timbers to be used as stringers from said trestle-work to a certain bent then being raised to position beyond said pretended completed trestle-work, but denies that plaintiff or any of his colaborers or co-employés had placed any such stringers in position on said trestle-work, or that they or any of them had ever assumed or undertaken, either properly or securely or otherwise, to adjust or fasten the same for any purpose whatsoever.

Denies that plaintiff ever assisted in either hoisting or putting into position any portion of the trestle-work which gave way and fell over.

Denies that the defendant has ever at any time warned or admonished plaintiff to exercise either all or any caution or care in and about any work, or to so proceed in or about any work as to avoid either all or any occasion or chance for injury or accident, but as to whether defendants have ever warned or admonished any of their other servants or employés to such purport this plaintiff has no knowledge or information sufficient to form a belief and therefore denies the same.

Denies that the fall and injury to plaintiff was due to or caused or in any way contributed to by either the carelessness or negligence of plaintiff or of any colaborer or coservant of plaintiff in or about said construction of said trestle-work or otherwise or in or about the handling or moving of stringers or timbers thereon or otherwise or by any insecure or insufficient manner in which either plaintiff or any of his fellow-servants had fastened or adjusted the same; and plaintiff specifically denies that he had fastened or adjusted any of said stringers or timbers either in an insecure or insufficient manner

or at all, or that he ever had anything to do with either the fastening or adjusting of the same or any of the same.

Denies that the giving way and falling or the falling of plaintiff was caused, either solely or at all, by the carelessness or negligence of either plaintiff or any of his colaborers or coservants or by either his or their failure to either properly or otherwise adjust, construct, or fasten said trestle-work or stringers or by any either careless, negligent, or insecure manner in which either he or they had performed their work or were then undertaking to perform their work or any work or labor or in which he or they were then undertaking to perform their work or any work or labor in putting any section or bent of said trestle in position or in extending or moving any stringers or any timber thereon, either in making any connection or otherwise, or that the injury to plaintiff was caused, either solely or at all, either by plaintiff's carelessness or negligence or by the carelessness of plaintiff's colaborers or coservants either
22 in or about said work or otherwise or by his or their carelessness or negligence in getting upon any trestle, either without having properly secured or fastened the same or otherwise.

II.

For a further reply to the second answer and pretended defense set up in defendants' answer herein the plaintiff admits the commencement of an action against the defendants herein in the district court in and for the county of Hennepin and State of Minnesota on or about the time in said answer set up and the service of the summons and complaint on defendants as therein alleged, and that said action was brought for the purpose of recovering damages from defendants by reason of the same injuries mentioned in plaintiff's complaint herein, but denies that said complaint set forth or alleged the same causes of actions set up and sued upon herein; but, on the contrary, plaintiff alleges that in this action plaintiff has set up and declared upon several negligent acts of the defendant not mentioned nor declared upon in said action in said district court in and for said county of Hennepin, State of Minnesota.

Admits the allegations contained in said second defense in regard to the service by the defendants of an answer in said action and of the serving of the reply as well as the allegation therein contained in regard to the service of notice of trial and of placing said cause on the calendar of the general term of said court and as to said action coming on for trial at the time therein stated, and that a jury was impanelled and sworn in said action, and that the counsel were present, and that plaintiff at said trial presented his case and offered and submitted his evidence and proof in support of his cause of action under the issues joined in said action.

But plaintiff specifically denies that said action or cause was fully tried or submitted upon the merits thereof.

Plaintiff admits that plaintiff in said action, after presenting his evidence, rested his case, and that defendants thereupon and before the final submission of the case moved the said district court that said action be dismissed on the ground that plaintiff had failed to

establish his cause of action, and that the said district court, after hearing counsel upon said motion, granted said motion and ordered a dismissal of said action; but the plaintiff specifically denies that said motion was made or asked upon the merits of plaintiff's case, or that the merits of said cause was then or there considered by the court, or that any evidence or proof in said action was offered or advanced upon the trial thereof except the proof offered and advanced by plaintiff, or that said motion was granted, or that said action was dismissed upon the merit- of said action, or that any order for dismissal of said cause upon the merits thereof was ever made or entered; but plaintiff alleges that the defendants did not,
23 at that time or during any time of the trial of said action, offer any testimony or rest their case or submit said action or cause to the court, but that such motion was made and such dismissal granted before the final submission of the case and without any submission of the case on the part of said defendants and was not made nor granted upon the merits.

Plaintiff admits the allegations in said answer contained in regard to stay of proceedings and preparation and allowance of a case and bill of exceptions, and that plaintiff submitted to said court a motion for new trial of said action, and that said motion was denied, and that plaintiff appealed from the order denying said motion for a new trial to the supreme court of the State of Minnesota; but denies that ever said cause was removed on appeal to said supreme court of the State of Minnesota, save and except by said appeal from said motion denying a new trial therein.

Admits that said supreme court is a court of last resort, and that it had full and appellate jurisdiction to hear and determine said appeal from said order, but denies that it had complete or final jurisdiction of said cause or any jurisdiction of said cause whatsoever, but only of said motion for a new trial.

Admits the making of a return from said district court to said supreme court on said appeal and the argument and submission of said appeal to said court, but denies that said cause was ever submitted upon its merits to said court, or that the same was either finally or otherwise submitted to said court for determination upon the merits thereof or for any other or different purpose than for determination as to whether the lower court erred in denying plaintiff's motion for a new trial in said action.

Admits the allegations of said answer in regard to the decision of said supreme court on said appeal and as to entry of judgment against plaintiff for the costs and disbursements on said appeal and as to the returning of the mandate from said supreme court to the clerk of the district court mentioned in said answer, and that a certain judgment of dismissal was thereupon made, rendered, and entered in the district court in and for Hennepin county, State of Minnesota.

But denies that the same was done upon notice thereof given or served by defendants upon plaintiff; and further denies that in or by said judgment said cause was either in full or otherwise or finally or otherwise determined in favor of said defendants or against said

plaintiff, either upon the merits of plaintiff's cause of action or otherwise, but alleges the fact to be that, said defendants having, for more than 10 days after they were by law allowed to enter judgment of dismissal in said action, *having* failed to enter such judgment, the plaintiff in this action gave due notice to the de-
24 fendants of his intended application to the clerk of said district to have judgment of dismissal of said action entered in said court, all of which was so done under the rules of practice adopted by and for said district court in and for said Hennepin county.

That thereupon and in pursuance to the said notice a judgment of dismissal of plaintiff's said action was entered in said district court, and that no other or further judgment has been entered in said action; that said judgment of dismissal so entered and rendered as aforesaid was entered and rendered on the 15th day of September, 1889, and was in words and figures as follows, to wit, and not otherwise:

"STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial District.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOOD and STEPHEN LOVEJOY, Partners as Wood & Lovejoy, Defendants.

Judgment.

The above-entitled cause, being at issue upon the complaint of the plaintiff and answer of the defendants and the reply of the plaintiff and being regularly on the calendar of the above-named court for trial at the December, 1888, general term thereof, came on for trial before the Hon. J. P. Rea, judge of said court, and a jury—

The plaintiff appearing by Messrs. Pierce, Arctander & Nickell, his attorneys, and the defendants by Messrs. Shaw & Cray, their attorneys. Thereupon, after the plaintiff had duly opened his case and introduced his witnesses and evidence in said cause and rested his case and before the final submission of the case, the attorneys for said defendants moved said court for a dismissal of said cause upon the ground that said plaintiff had failed to make out a case against said defendants, which motion was granted; and said cause having been afterwards appealed to the supreme court of Minnesota by an appeal from the order of this court denying said plaintiff's motion for a new trial herein, and said supreme court having duly affirmed said order denying a new trial and having duly issued a remittitur to this court, which has been duly filed in this court:

Now, therefore, upon motion of Messrs. Shaw & Cray, attorneys for said defendants, it is ordered and adjudged that said action be, and it hereby is, dismissed, and that said defendants have and recover of said plaintiff the sum of seven and fifty-three one-hundredth-

dollars for their costs and disbursements of said action duly taxed and allowed herein.

By the court:

C. B. TIRREL, *Clerk.*"

25 That before the commencement of this action plaintiff paid to the defendants herein the sum of $7.53, their costs and disbursements in said action taxed and allowed.

Plaintiff denies that by the hearing or trial of any action in said answer mentioned or by any appeal therein plaintiff's cause of action in said action or his cause of action in the complaint herein set forth was either duly, fully, or otherwise heard, tried, considered, or determined upon the merits thereof.

Denies that any judgment in said action given, made, rendered, or entered is either a full, complete, or final adjudication or determination of said action or of plaintiff's claim therein or of plaintiff's claim in his complaint herein set forth, or that the same or any of the same is a bar to plaintiff's cause of action herein or either a full or final or other judicial determination thereof.

And plaintiff further alleges that by and under the provisions of the statute of the State of Minnesota an action may be dismissed without a final determination of its merits by the court where, upon the trial and before the final submission of the case, the plaintiff abandons it or fails to sustain or establish his claim or cause of action or right to recover.

And plaintiff further alleges that said action in said district court in and for said Hennepin county, State of Minnesota, in said answer mentioned was so dismissed under the provisions of the said statute of Minnesota and not otherwise, and that by the law of said State said dismissal and judgment of dismissal entered therein is not a determination of said action upon the merits nor a bar to the bringing of another and further action for the same cause of action.

Wherefore plaintiff demands judgment as in his complaint prayed for.

ARCTANDER & ARCTANDER,
Attorneys for Plaintiff.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

August Lindvall came before me personally, and, being duly sworn, doth say that he is the plaintiff in the above-entitled action; that the foregoing reply is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters that he believes it to be true.

(Signed) AUGUST LINDVALL.

Subscribed and sworn to before me this 17th day of October, A. D. 1889.

[NOTARIAL SEAL.] JNO. W. ARCTANDER,
Notary Public, Hennepin Co., Minn.

Indorsed: Reply. Filed Oct. 18, 1889. Oscar B. Hillis, clerk.

26 And afterwards, on the 21st day of June, the following proceeding of court was had, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1890. June 21st, 1890.

AUGUST LINDVALL
vs.
JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods & Lovejoy. } E. Law. 699.

This cause being regularly called for trial, plaintiff appears by his attorney, John W. Arctander, and the defendants by their attorneys, Shaw and Cray.

Thereupon, upon motion of plaintiff's said attorney, it is ordered that a jury come, to wit, William P. Abbott, William A. Patten, C. G. Gardner, H. M. Temple, James McQuade, William L. Klein, Charles E. Cole, Webster Smith, John H. Pease, J. M. Daggett, C. C. King, and Joseph Smith, twelve good and lawful men, who are duly sworn to try the issues herein, and the trial of said cause is proceeded with as follows:

By agreement of said attorneys the second defense set up in defendants' answer herein is heard by the court upon plaintiff's complaint, defendants' second defense, and plaintiff's reply to said second defense; also the evidence submitted by the defendant, to wit, a duly certified copy of a judgment-roll in an action between the same parties in the district court of the county of Hennepin, State of Minnesota, mentioned in the second defense and in said answer set forth; also a duly certified copy of the minutes of said district court in said action.

Thereupon, upon hearing the arguments of the said attorneys concerning the same and upon due consideration thereof and being advised in the premises, it is considered and decided by the court that the said second defense constitute- a complete defense, estoppel, and bar to the maintenance on this action by the plaintiff herein in this court.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until Monday morning, June 23d, A. D. 1890, at 10 o'clock.

And afterwards, on the 23d day of June, the following proceeding of court was had as follows, to wit:

27 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1890. June 23d, 1890.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.*

This day again come the parties herein by their respective attorneys; also the jury sworn to try this cause. Now, the court, having

heretofore (after hearing evidence thereon) determined and decided that the second defense set up and pleaded in defendants' answer herein and replied to in plaintiff's reply herein is a complete defense, estoppel, and bar to the maintenance of this action by the plaintiff herein in this court, charges the jury accordingly and instructs them to find and return into court a verdict for defendants. Thereupon the jury find and return into court their verdict in words and figures as follows: "We, the jury in the above-entitled action, find for the defendants. William A. Patten, foreman."

It is therefore considered, ordered, and adjudged that the above-named defendants go hence without day and do have and recover of and from the above-named plaintiff their costs and disbursements herein to be taxed, and that they have execution therefor.

Upon motion of plaintiff's attorney, it is ordered that execution herein be, and the same is hereby, stayed for a period of 42 days from date hereof, that the plaintiff may prepare and present a motion for a new trial hereof.

And on the same day the following verdict for the defendants was filed, as follows, to wit:

United States Circuit Court, District of Minnesota.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.*

We, the jury in the above-entitled cause, find for the defendants.

W. A. PATTEN, *Foreman.*

Indorsed: Verdict for defendant. Filed June 23d, 1890. Oscar B. Hillis, clerk.

Judgment-roll signed this 23d day of June, A. D. 1890.
Attest: OSCAR B. HILLIS, *Clerk.*

Indorsed: Judgment-roll. Filed June 23d, 1890. Oscar B. Hillis, clerk.

28 And afterwards, on the 5th day of July, 1890, the following order granting a new trial was entered in the words as follows, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1890. July 5th, 1890. T. M., vol. 2, page 63.

AUGUST LINDVALL
vs.
JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods & Lovejoy. } E. Law. 699.

Defendants' motion to set aside the verdict heretofore rendered herein and vacate the judgment entered therein and for a new trial

of said cause having been heretofore fully argued by the attorneys for the respective parties, duly submitted, and by the court taken under advisement: Now, *the court*, after due consideration thereof and being fully advised in the premises, it is ordered by the court that said motion be, and the same is hereby, sustained; that said verdict be, and the same is hereby, set aside and the judgment entered thereon be, and the same is hereby, vacated and for naught held, and a new trial is hereby granted.

It is further ordered that said cause be, and it is hereby, continued to the next regular term of this court.

And afterwards, on the 3d day of February, 1891, the following proceedings of court was had as follows, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, 1891. February 3d, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.* } Eq. Law. 699.

This day come the parties herein—the plaintiff, by John W. Arctander, his attorney, and the defendants, by Shaw & Cray, their attorneys; thereupon, upon motion of plaintiff's said attorney, it is ordered that a jury come, to wit, Peter Burns, H. P. Orcutt, Allen Cory, F. A. Blanchard, Wm. Pennington, James Kent, C. W. Clark, Christopher Varley, J. M. Daggett, Andrew Jensen, G. W. Swank, C. A. Everett, twelve good and lawful men, who are duly sworn to try the issues joined herein, and the trial of said cause is proceeded with as follows:

John W. Arctander opens the case for the plaintiff.

John Johnson is sworn and examined in behalf of plaintiff.

29 And, the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

And afterwards, on the 4th day of February, the following proceeding of court was had as follows, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1891. February 4th, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.*

This day again come the parties herein, by their respective attorneys, also the jury sworn to try said cause, and the further trial of the same is proceeded with as follows:

John Johnson is recalled and further examined on behalf of the plaintiff.

F. W. Capellen is sworn and examined on behalf of plaintiff.
C. J. A. Morris is sworn and examined on behalf of plaintiff.
B. M. Dahl is sworn and examined on behalf of plaintiff.
George W. Brown is sworn and examined on behalf of plaintiff.
Charles Steenerson is sworn and examined on behalf of the plaintiff.
August Lindvall is sworn and examined on his own behalf.
And, the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

And afterwards, on the 5th day of February, the following proceeding of court was had as follows, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1891. February 5th, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.*

This day come the parties herein, by their respective attorneys, also the jury sworn to try the cause, and the further trial of the same is proceeded with as follow-:
August Lindvall is recalled and examined on his own behalf.
Dr. J. F. Moore is sworn and examined on behalf of plaintiff.
Dr. J. H. Dunn is sworn and examined on behalf of plaintiff.
Dr. Chas. J. Spratt is sworn and examined on behalf of plaintiff.
And, the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

And afterwards, on the 6th day of February, the following proceedings of court were had as follows, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1891. February 6th, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.*

This day again come the parties herein, by their respective attorneys, also the jury sworn to try said cause, and the further trial of the same is proceeded with as follows:
August Lindvall is recalled and examined on his own behalf; and here the plaintiff rests.

Thereupon defendants' attorney moves the court to instruct the jury to find for the defendant-, and said motion being duly submitted

and the court, being fully advised in the premises, overrules and denies the same after defendants' testimony is all in.

Mr. Cray opens the case for defendants.

John Woods is sworn and examined on behalf of defendants.

Dr. Frank Burton is sworn and examined on behalf of the defendants.

Dr. A. C. Fairberin is sworn and examined on behalf of the defendants.

Dr. E. H. Holmes is sworn and examined on behalf of defendants.

And, the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

And afterwards, on the 7th of February, the following proceeding of court was had as follows, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1891. February 7th, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.*

This day again come the parties herein, by their respective attorneys, also the jury to try said cause, and the further trial of the
31 same is proceeded with as follows:

P. J. Mahoney is sworn and examined on behalf of defendants.

F. G. Einston is sworn and examined on behalf of defendants.

Chas. S. Richards is sworn and examined on behalf of defendants.

Alexander Murdock is sworn and examined on behalf of defendants.

And, the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until Monday morning at 10 o'clock.

And afterwards, on the 9th day of February, the following proceeding of court was had as follows, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1891. February 9th, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.*

This day again come the parties herein, by their respective attorneys, also the jury sworn to try this cause, and the further trial of the same is proceeded with as follows:

Alexander Murdock is recalled and examined on behalf of defendants.

E. T. Abbott is sworn and examined on behalf of defendants.

John Mahoney is sworn and examined on behalf of defendants.

Thereupon defendants' attorneys, to sustain the second defense set up in defendants' answer filed in this cause, offer in evidence the record of the trial and proceedings had in the district court of Hennepin county, Minnesota, and the record of the proceedings had on appeal in the supreme court of the State of Minnesota in a cause wherein the same parties as herein were plaintiff and defendant-; and, the said offer being objected to by plaintiff's attorney, the objection thereto is by the court sustained; to which ruling defendants' attorneys duly except.

Thereupon defendants rest their case.

John M. Clark is sworn and examined on behalf of plaintiff in rebuttal.

Louis Rundvall is sworn and examined on behalf of plaintiff in rebuttal.

And here plaintiff again rests.

Thereupon defendants' attorneys move the court to instruct the jury to find and return into court a verdict for defendant-.

Said motion being argued on behalf of defendant by J. M. Shaw and on behalf of plaintiff by J. W. Arctander, and the same not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

And afterwards, on the 10th day of February, the following proceeding of court was had as follows, to wit:

32 United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1891. February 10th, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.*

This day again come the parties herein, by their respective attorneys, also the jury to try said cause, and the further trial of the same is proceeded with as follows:

Defendants' motion for the court to instruct the jury to find and return into court a verdict for the defendant- is further argued by the attorneys for the respective parties, duly submitted, and, the court being fully advised in the premises, it is ordered that said motion be, and the same is hereby, overruled and denied.

Thereupon J. M. Shaw sums up the case for the defendants. John W. Arctander sums up the case for the plaintiff.

And the trial of said case not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until to-morrow morning at 10 o'clock.

And afterwards, on the 11th day of February, the following proceeding of court was had as follows, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, January Term, A. D. 1891. February 11th, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods & Lovejoy.

This day again come the parties herein, also the jury sworn to try said cause, and the further trial of the same is proceeded with as follows:

John W. Arctander closes his argument on behalf of plaintiff. Thereupon the court instructs the jury and they retire to consider of their verdict.

After due consultation concerning the same, and being fully advised in the premises, they find and return into court, by their foreman, their verdict in the words and figures as follows, to wit:

"We, the jury in the case of August Lindvall *vs.* Woods & Lovejoy, hereby find for the plaintiff in the sum of three thousand eight hundred dollars ($3,800) damages.

"CHAS. A. EVERETT, *Foreman.*

"February 11th, 1891."

33 It is therefore considered, ordered, and adjudged by the court that the above-named plaintiff do have and recover of and from the above-named defendants or either or any of them the aforesaid sum of three thousand eight hundred dollars ($3,800), so found to be due by the jury, besides his costs and disbursements herein, to be taxed, and that he have execution therefor.

And on the same day the following verdict for plaintiff for $3,800 was filed in the words and figures, to wit:

We, the jury in the case of August Lindvall against Woods & Lovejoy, hereby find a verdict for the plaintiff in the sum of three thousand eight hundred ($3,800) dollars damages.

CHAS. A. EVERETT, *Foreman.*

February 11th, 1891.

Judgment-roll signed this 11th day of February, A. D. 1891.
Attest: OSCAR B. HILL-S, *Clerk.*

Judgment for plaintiff	$3,800 00
Costs	142 50
Total	$3,942 50

Indorsed: Judgment-roll. Filed February 11th, 1891. Oscar B. Hillis, clerk.

And afterwards, on the 13th of June, 1891, there was filed in the clerk's office the affidavit of W. R. Cray in the words and figures as follows, to wit:

In the Circuit Court of the United States, District of Minnesota.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods & Lovejoy, Defendants.

STATE OF MINNESOTA, *County of Hennepin*, } *ss:*

Willard R. Cray came before me personally and, being duly sworn, on his oath says that he is one of the attorneys of the defendants in the above-entitled cause; that he was present at and as such attorney participated in the trial of said cause, which occurred in the above-named court, before the Hon. R. R. Nelson, judge, and a jury, beginning on the 3d day of February, A. D. 1891, and ending with the submission of said cause to said jury and a verdict by said jury on the 11th day of February, A. D. 1891.

34 The Messrs. Arctander & Arctander are the attorneys for and represented the above-named plaintiff at and during said trial; that on the 10th day of February, A. D. 1891, said cause was summed up and argued to the jury by counsel for said respective parties, and John W. Arctander, Esq., one of the plaintiff's counsel, summed up and argued the said cause to said jury on behalf of said plaintiff; and while thus arguing and summing up said cause in open court said John W. Arctander proposed and stated to said jury, as nearly as affiant can recall and reproduce from minutes which he made at the time, for the purpose of calling attention of the court thereto and the taking of an exception to the same, as follows, to wit:

That "the plaintiff," August Lindvall, "is entitled to and ought to have a verdict in this case against the defendants of ten or fifteen thousand dollars, but we have spent a good deal of time in this litigation already in trying this lawsuit and I don't want you to give the plaintiff more than five thousand dollars, for if you do give him a verdict of more than five thousand dollars the other side will appeal and the case might be reversed. Now, if you will give the plaintiff five thousand dollars, or not any more than five thousand dollars, I will guarantee you that that poor boy 'Gus' (referring to the plaintiff) shall have every dollar of it, and I won't charge him a cent for my services."

That besides said foregoing statements and promise made by said Arctander to said jury said Arctander then and there, in open court, to said jury further stated and clearly and quite fully explained, in substance, that the provisions of the law were such that if said jury should render a verdict of more than five thousand dollars said defendants could and would appeal to the Supreme Court of the United States and might obtain a reversal of the case; but if they, the jury, would give said plaintiff a verdict of five thousand dollars or a sum not to exceed five thousand dollars said defendants could not then appeal and would have to pay it.

And affiant further says that since said trial he has been informed

by at least two different persons, who were in the court-room when said cause was being tried, that while the counsel for said defendants was summing up said cause and arguing the same before said jury and a short time before said Arctander came to sum up said cause and address said jury that said Arctander stated to them that when he came to address said jury that he, said Arctander, should tell said jury that he, Arctander, did not want the said jury to render a verdict of more than $5,000, and that he, the said Arctander, would state to said jury his reasons therefor substantially as hereinbefore set forth; and affiant further says that said statements and proposition to said jury by said Arctander were made with apparent deliberation and purposely made, as affiant verily believes, and, as affiant is informed and, believes to be true and upon his information and belief alleges, purposely made with the intention of influencing said jury to return a verdict in some amount which would prevent a review of said cause by the Supreme Court of the United States and upon the promise and verbal guarantee on his, said Arctander's, part that plaintiff should receive the whole amount of such verdict.

WILLARD R. CRAY.

Subscribed and sworn to before me on this 5th day of March, 1891.

[SEAL.] J. C. FIFIELD,
Notary Public, Hennepin County, Minn.

Indorsed: Affidavit of W. R. Cray. Filed June 13th, 1891. Oscar B. Hillis, clerk.

And afterwards, on the 25th day of July, there was filed in the clerk's office the following affidavit of John W. Arctander in the words and figures as follows, to wit:

In the United States Circuit Court in and for the District of Minnesota.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods & Lovejoy, Defendants.

Counter-Affidavit.

STATE OF MINNESOTA, *County of Hennepin,* } *ss:*

John W. Arctander, being first duly sworn, says that he is one of the attorneys for the plaintiff in the above-entitled cause; that he has read the affidavit of Willard R. Cray herein, to be used on motion for a new trial in the above-entitled action; that the language in said affidavit contained and attributed to this affiant and alleged to have been used by him in the argument of the said cause to the jury was not so by the said affiant used, nor was it anywhere

near the language which this affiant did use; that no objection or exception of any kind was entered by defendants' counsel while affiant was addressing the jury or immediately after he had finished addressing the jury in his closing argument, nor did defendants' counsel or any of them, although present in court during the whole of said argument of affiant, in any way call the attention of the court or this affiant to any improper language used by this affiant in his argument to the jury or to any language used by this affiant in his argument to said jury or in any way object to the same,
36 nor was any such objection or exception made during the session of the court in which said argument was made; that within a few moments after counsel for defendants had closed his argument to the jury the court adjourned for the day; that the charge of the court to the jury was made at the morning's session of the next day; that affiant is informed and believes that counsel for defendants, before the court commenced to charge the jury on said morning, called the attention of the court to the alleged objectionable language on the part of affiant to the jury on the foregoing evening, but that the same was not done in affiant's presence; that at said morning's session affiant was unavoidably late and came into court about five minutes after court had opened and after the court had commenced to charge the jury; that the first intimation affiant had of any claim that any objectionable language had been used by him in addressing the jury in his closing argument was the remarks made by the court in reference thereto in said charge hereinafter given in full and by the rebuke in said charge administered to affiant by said court; that immediately after the adjournment of that morning session of court and while affiant's recollection of the language used by him in addressing the jury was fresh and vivid and on the same day that said jury was charged by the court affiant made a full and complete memorandum of the exact language used by affiant and which he understood had been considered objectionable by defendants' counsel, and that affiant then and there made said memorandum with no other view than from a conscientious desire to perpetuate the exact language used by him if any question should thereafter come up as to what the exact language by him used was; that after having made said memorandum of his said language affiant showed the same to his partner, Ludwig Arctander, who was present in court and heard said language used by affiant and his whole closing argument, for the correction of any possible error in affiant's recollection of the same, and that the recollection of affiant's said partner fully and wholly coincided with affiant's recollection with reference to said language so used; that according to the memorandum so then and there and at the time made by affiant the exact language used by affiant to the jury upon the subjects mentioned in said Cray's affidavit, instead of the language purported to be given in said Cray's affidavit, is and was as follows and not otherwise, and that affiant's recollection is still distinct that the following is the exact language used by affiant in said argument to the jury, and that no

other language was used by him on any of the subjects in said affidavit referred to except what follows, to wit:

"Now, gentlemen, as to the amount of your verdict. There is no doubt in my mind that plaintiff, if entitled to a verdict at all under the evidence of the physicians on his side, and I have before showed you that you must give full credence to their evidence, is entitled to a verdict for at least $15,000. It is no doubt in
37 my mind that even by giving him that sum he will not be made whole; but in this case we will not ask you to give us a verdict for all we think we are entitled to. I think we ought to have $15,000, but I ask you to return a verdict for plaintiff only in the sum of $5,000, not one cent more nor one cent less. What we are entitled to over that sum we will make the defendants a present of, and I shall give notice that plaintiff remits all of his claim for damages over $5,000, as we call it in legal term-ology.

"This may seem strange to you, but I will explain the reasons for my position. If you give plaintiff $5,000 and no more, these defendants will have to pay it within a short time, and I want this poor boy to have and enjoy his compensation while he is still alive and can enjoy it. Five thousand dollars now is better to him than ten or fifteen thousand will be in five years from now, and this delay is what a verdict for one cent over $5,000 would amount to. If your verdict should be ten or fifteen thousand, or even only $5,000 and one cent, the defendants could, and I have no doubt would, appeal to the Supreme Court of the United States. If it was only a question of their chance of reversing your verdict, I would not care a fig for their appeal, for I will take my chances on that; but the question is of keeping this poor boy out of his damages for four or five years, for that's what an appeal to the Supreme Court of the United States means, in the deplorable state in which its crowded docket now stands. If your verdict is just $5,000, not a cent more nor a cent less, then the defendants cannot keep this plaintiff waiting for five years for his just compensation, for then they can't appeal, and I think you will agree that his just reward has been delayed long enough. Time enough and money enough has been spent in this litigation. It is time it came to an end.
* * *

"Don't let the insinuations of counsel for defendants, that this case is not brought for the benefit of the plaintiff, but that the real beneficiaries are plaintiff's attorneys, and that you ought not to mulct his clients in order to fill a lawyer's coffers, prejudice you against my client's cause, for it so happens, gentlemen, that in this case no verdict you give my client will enrich me in the least. This is a charity case, and before I commenced it in this court, in order to induce him to let me bring the case over again, after he was smarting under his defeat in the State courts, I promised Gus. that every dollar we recovered should be his, and that I would not charge him a cent for my services in this case, and I now reiterate this promise in your presence. He shall have every dollar of it."

That the Honorable John M. Shaw, who summed up the case to the jury for the defendants, in his summing up stated to the jury,

substantially, that counsel for plaintiff would undoubtedly resort to all means to arouse their sympathy for the injured plaintiff, and that he was fruitful in such resources; but that he wanted
38 them not to lose sight of the fact that when counsel for plaintiff would most earnestly plead to them he was speaking at least as much for his own benefit as for that of the plaintiff, if not more, and that the real beneficiary in this case was plaintiff's attorneys, and that his clients ought not to be mulcted in order to fill a craving lawyer's coffers.

That the latter part of the remarks of affiant to the jury hereinbefore given were provoked by such language of counsel for defendants and were intended simply as an answer to such improper language upon the part of the counsel for the defendants, and there was no evidence in the case whatever that affiant or plaintiff's attorney had any money interest or financial interest in said cause whatsoever.

That the Hon. R. R. Nelson, in charging the jury in said action, used the following language with reference to the statements of counsel for plaintiff: "Now, I was very sorry to hear the gentleman who concluded, in summing up the testimony on the part of plaintiff, advance the idea that the amount, if you should believe that the plaintiff was entitled to a verdict, should be fixed by you, so that the defendants could not have a review of this case in a higher court. That is not the rule or measure of damages for personal injuries, and if I believed that any such verdict would be returned by you or if any verdict based upon any such information is returned and justice to that extent thwarted that verdict would be set aside before the ink recording it had time to become dry. That is not the rule of law upon which litigations of this sort ought to be tried. It is not a measure of damages which a person suffering from a personal injury through the negligence of another is entitled to recover."

Again, after concluding the charge, the counsel for defendants having entered an exception to the remarks of plaintiff's attorney in his closing argument, the court charged the jury on said point as follows: "I have stated to you, gentlemen, as to this question in regard to the amount of the verdict, if you should think the plaintiff is entitled to any amount, that I have control of your verdict, and although I don't mean to say but what in the exercise of sound discretion and judgment you may think that this compensation should be less than $5,000 and return such a verdict, still when it has been intimated, as I may say, to you by counsel that you should find less than such an amount because that would prevent the defendants from having a review of this case, why, any verdict which I can see is returned on such basis would not stand for a moment. I should set it aside."

That immediately after the jury had been charged by the court in said action and before said jury was sent out affiant, in open court and in the presence of the jury, stated to the court in substance as follows: "With reference to the remarks of the court in re-
39 gard to the language used by me to the jury with reference to

not returning a verdict of not over $5,000, so as to prevent an appeal of the case, I ask leave to state that I acted in good faith and in the full and fair belief that I had a right to make the statement. I have repeatedly made similar statements to juries in this court without any objection either from counsel or court, and I am informed that the courts of the United States have allowed plaintiffs to remit, even after verdict for more than $5,000, such excess, so as to prevent an appeal. I therefore considered, in making the statement, that plaintiff always would have a right before verdict to limit the amount of his recovery if he so desired it; but as the court seems to take a different view of the matter from me, I desire to apologize to the court and jury for the language used by me and to equivocally retract what I said on that subject, which, of course, after what the court has stated, will be considered by the jury as if it was never said.

I most sincerely deprecate that I have been guilty of any conduct which to the court would seem improper, and I think the court knows me well enough to feel satisfied that I did not intentionally do wrong.

In order to convince the court that I was sincere in my desire expressed in the matter, I now ask the leave of the court to amend the complaint in this action so as to reduce the *ad damnum* to $5,000;" to which statement of affiant, then and there and in open court made, the court answered that such request for amendment came too late and could not be allowed.

And further affiant saith not.

JOHN W. ARCTANDER.

Subscribed and sworn to before me this 18th day of July, A. D. 1891.

[SEAL.] JOHN G. H——,
Notary Public, Hennepin Co., Minn.

In the United States Circuit Court in and for the District of Minnesota.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOOD and STEPHEN B. LOVEJOY, Partners as Woods & Lovejoy, Defendants.

Counter-Affidavit.

STATE OF MINNESOTA, *County of Hennepin,* } ss:

Ludvig Arctander, being first duly sworn, says that he is one of the attorneys for the plaintiff in the foregoing-entitled action; that he has read the foregoing affidavit of John W. Arctander, and says that he was present at the time the closing argument was made to the jury by said John W. Arctander, one of the counsel for plaintiff herein, and that he heard all of the same and paid particular attention to the same and all of the same.

That the next day the said John W. Arctander submitted to affiant a memorandum made by him of the pretended objectionable language used by him on said argument, and that affiant, in whose mind said argument was then entirely fresh, carefully examined said memorandum with a view to discover whether or not the same gave a fair and correct statement of the language used by said John W. Arctander in said argument; that the language given in the foregoing affidavit is the exact language written in said memorandum, and that affiant is positive that the same represents as fairly as can be without a stenographic report the exact language used by said John W. Arctander on said argument with reference to the matters complained of by the defendants.

LUDVIG ARCTANDER.

Subscribed and sworn to before me this 18th day of July, A. D. 1891.

JOHN G. H——,
Notary Public, Hennepin County, Minnesota.

Indorsed: Counter-affidavit. Filed July 25th, 1891. Oscar B. Hillis, clerk.

It is hereby stipulated that the within copy of the record may be attached to the return herein by the clerk of the circuit court of appeals and be printed in record immediately after approval of John W. Arctander.

Dated Sept. 29, 1891.

J. M. SHAW,
WILLARD R. CRAY,
Attorneys for Plaintiffs in Error.
JNO. W. ARCTANDER,
Attorney for Defendant in Error.

United States Circuit Court, District of Minnesota, Third Division.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS *et al.*, Defendants.

Certified copy of the orders of court overruling motion for a new trial.

Filed Oct 1, 1891.

JOHN D. JORDAN, *Clerk.*

41 United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1891. July 17th, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.* } E. Law. 699.

Defendants' motion to set aside the verdict heretofore rendered herein and vacate the judgment entered thereon and for a new trial

of this cause coming on to be heard, the same is argued on behalf of the defendants by J. M. Shaw and on behalf of the plaintiff by John W. Arctander.

And the hearing thereof not being concluded at the hour of adjournment, it is ordered that further proceedings herein be, and they are hereby, postponed until Saturday next, at 10 o'clock a. m.

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1891. July 24th, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS *et al.* } E. Law. 699.

Defendants' motion to set aside the verdict heretofore rendered herein and vacate the judgment entered thereon and for a new trial of this cause coming on to be further heard, the same is further argued on behalf of the parties by their respective attorneys, duly submitted, and the court being fully advised in the premises, it is ordered by the court that said motion be, and the same is hereby, overruled and denied; to which overruling of said motion defendants' attorney entered an exception, which exception is by the court hereby noted.

UNITED STATES OF AMERICA,
District of Minnesota, Third Division, } *sct:*

I, Oscar B. Hillis, clerk of the circuit court of the United States for the district of Minnesota, do hereby certify that I have carefully compared the foregoing paper-writings with the originals thereof, which are in my custody as such clerk, and that such copies are correct copies of such originals and of the whole thereof in the cause therein named.

U. S. Circuit Court Seal, District of Minnesota, Third Division.

Witness my hand as clerk and the seal of said court. Done at my office, in St. Paul, Minnesota, this 22d day of September, A. D. 1891.

OSCAR B. HILLIS, *Clerk.*

And afterwards, to wit, on the 29th day of July, 1891, the following objections to signing and sealing bill of exceptions *was* filed in the words and figures as follows, to wit:

42 In United States Circuit Court, District of Minnesota, for Third Division, in June Term, 1891.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOOD and STEPHEN B. LOVEJOY, Partners as Wood & Lovejoy, Defendants.

Now comes plaintiff herein and objects to the settlement or allowance or signature or sealing of any bill of exceptions herein, for the

reason that the same was not tendered or signed or sealed at the term at which said cause was tried or at which judgment herein was entered, and no consent having been given extending the time or any order having been made by the court during said term expiring by limitation on June 22d, 1891, extending the time in which said bill of exceptions could be tendered, and the same not having been tendered to plaintiff's attorneys before July 28th, 1891.

Respectfully, ARCTANDER & ARCTANDER,
Attorneys for Plaintiff.

Indorsed: Objection to signing and sealing bill of exceptions. Filed July 29th, 1891. Oscar B. Hillis, clerk.

And afterwards, to wit, on the same day, the following proceeding of court was had in the words as follows, to wit:

United States Circuit Court for the District of Minnesota.

Term Minutes, June Term, A. D. 1891. July 29th, 1891.

AUGUST LINDVALL
vs.
JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods & Lovejoy. } E. Law. 699.

This day come the parties herein, by their respective attorneys, and, the motion for a new trial of this cause having been denied by the court upon the 24th day of July, A. D. 1891, the defendants now present to the court a bill of exceptions; whereupon plaintiff's attorney objects to the signing thereof.

Thereupon, after hearing the said attorneys, said bill of exceptions is signed by the judge and ordered to be filed and made a part of the record herein, which accordingly is done.

To all of which plaintiff's attorney excepted.

And afterwards, to wit, on the 30th day of July, the following bill of exceptions was filed as follows, to wit:

43 United States Circuit Court, District of Minnesota.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN B. WOODS and STEPHEN B. LOVEJOY, Partners as Woods & Lovejoy, Defendants.

This cause came on for trial at the January term, 1891, in and for the third division of the district of Minnesota, and was tried before the Hon. R. R. Nelson and a jury on February 3d, 1891, and for several days thereafter.

Plaintiff, to sustain the issue on his part, introduced evidence tending to show the following facts:

Plaintiff is an alien and a subject of his majesty the King of Sweden and Norway. Defendants, in the winter and spring of

1888, were as contractors engaged in constructing a railroad bed for the St. Paul and Duluth R. R. Co. for a distance of some ten or twelve miles.

The work consisted in constructing a road-bed by making cuts in hills and in filling low places. The defendants, about New Year, 1888, started in on the work at three different places with three separate crews.

One of the crews — under the charge of one Aleck Murdock, and the work by it to be performed was cutting down a hill near Gladstone, Minnesota, and to fill a long stretch of low country below said hill. Another crew, under one Woods, a brother of one of the defendants, was at work from the other side of the hill in an opposite direction, and the third crew, a mile or two distant, was under the charge of one Mahoney.

The work in charge of Aleck Murdock was performed as follows:

At the base of the hill a trestle-work was erected consisting of ten trestles, all raised at the same time, built of square timbers and consisting of trestle-bents from two to five feet high, on which were laid stringers. On these stringers were placed ties, to which was bolted iron rails, thus constituting a track, on which to run out "Petler" dumping cars filled with dirt in the cut, which dirt was dumped at the end nearest the hill until a sufficient fill was produced.

The stringers were not in any way fastened to the trestles nor was there any longitudinal braces between the bents. After the first ten bents had been filled up with dirt the work proceeded in the same manner, except that from that time to the day of the accident only one or two bents were raised at any one time,
44 and as the work progressed the trestle-bents became higher until they, on the day of the accident, were from twenty-one to twenty-four feet high.

There was also this difference—that instead of square timber round timbers were used; about ten to twelve inches at the bottom and seven to eight inches at the top.

The caps of the trestle-bents were also round timbers surfaced on the top for about five inches. These caps were from eight to ten inches through. They were fastened to the legs of the trestle with spikes. At the ends the caps were also surfaced below for about five inches. The distance between the legs at the ground was about thirteen feet, at the top about two feet.

The caps were about 6 feet long. There was no longitudinal bracing or bracings of any kind between the different trestle-bents, but the legs of each trestle-bent were held together by cross-bracing. On top of the caps was placed, at 2 feet distance from each other, two stringers of 8 x 10 sawed timbers and of different lengths; some 16 feet and some 32 feet. When the 16-feet stringers were used the distance between the trestle-bents was about 12 feet. When the 32-foot stringers were used the distance was about 27 feet. The stringers were not laid so as to buttress one against the other, but so as to overlap, one beside the other.

The stringers were not bolted or spiked to the caps, nor were

they provided with chucks on either side of the cap, nor were there any bolts driven in them on either side of the caps, nor were they fastened in any way to the trestle-posts except that the person who had charge of the building of the trestles and their erection, after the ten first trestles had been built, was in the habit of tying with hand a ¾ or 1 inch rope around the stringer and the cap, which Murdock had observed. He had no orders either from defendants or from Murdock to do this. He used no other force except his hands with which to tighten or tie the ropes. On top of these stringers, but not spiked or fastened to them, was then laid ties and rails in the same manner as was done on the first ten trestles erected, the rails spiked to the ties and the rails fish-plated at the end, 30-foot rails, 40 to the foot. At the time of the accident there was a continuous track of about 400 feet from the cut. When the fill was completed the stringers were taken out and used for further trestles, and the ties were then made to rest on the dirt. At the time of the accident about 35 or 40 trestle-bents had been erected at this particular place under the charge of Mr. Murdock by one Johnson. The men working at this place under Murdock consisted of different sets of men. One set of men, about 20 or 30, worked in the cut digging out the dirt and filling the cars. One set of men were to drive the teams which hauled the cars from the cut to the dump and back. One set of men, consisting generally of four or five men, worked at the dump or the end of the fill unloading the cars and evening the dirt, shoveling and tamping under the track. One man, Johnson, built the trestles and raised them and put them in position, placed the stringers and laid on them the ties and track with the assistance of other men furnished him on his request by Murdock. Of all these different men, both those in the cut, on the dump, the teamsters, and the trestle-builder, Murdock had the charge and control. He hired and discharged the men under him; directed the work, how it should be done and when it should be done; ordered the men working under him to go to any different place when he so desired. Nobody else gave any orders to any of the men, and they were all bound to obey his orders and directions. He went from the cut to the dump and on the trestle-work, back and forth. He did not work himself unless to show the men how the work should be done, but occasionally took hold to help the men out. The defendants both resided at Minneapolis, about twenty miles away from the place. During the progress of the work defendant Lovejoy was never there.

Defendant Woods visited the works two or three times a week, but stayed only for a short time; sometimes a few minutes and sometimes an hour or more. He did not give any orders to the workmen nor direct them in any manner. If any orders were given by him, they were given by Mr. Murdock. Murdock set Johnson to work to build trestles when the work first commenced, soon after New Year.

The first ten trestles were raised by Murdock with Johnson's assistance. All the subsequent trestles were raised by Johnson on

Murdock's orders. The trestle-work was built for temporary purposes, the bents to remain in the fill, but the stringers to be taken out.

Immediately before the commencement of the work at Gladstone Murdock had had charge of a similar work in Lowry and Douglass hill, in Minneapolis. While working at these hills under Murdock, in the fall and winter before and shortly before going to Gladstone, Johnson, who had been working at oiling and fixing cars, was by Murdock set to work building trestles. Before setting him to work Murdock asked him if he was good at bridge-building. Johnson told him that he did not understand anything about it at all.

Johnson was not a carpenter. He had not learned the trade of a carpenter. Murdock then set him to work building trestles in Lowry and Douglass hill, where Johnson built altogether six or seven trestles. Johnson had had no experience in trestle-building before the six or seven trestles in Douglass hill, and those he then built was all that he had built before, except that he had helped build stable for the horses and camp for the men before he was put to work at building and raising the trestles on the works near Gladstone.

46 On April —, 1888, plaintiff came out to Gladstone and applied to Murdock for work. Murdock told him that he could go to work on the dump. His duties in working on the dump was dumping cars, shoveling dirt, and tamping up the track—that is to say, to fill up dirt under it and under the ties. His duties did not call him any further out on the trestle-work than to the edge of the dump. He worked for defendants from April 2d till April 20th, when injured. He had nothing to do with the building of the trestles or with erecting the trestle-work or with the placing of it in position or in placing the track, and the only assistance he ever gave to this work was one morning a few days after he came to the works, when he, at the request of Johnson, helped to shove out a couple stringers. On the morning of the accident, when the men came to work, there was two trestle-bents standing. The one nearest to the dump was covered with dirt one-half way up the legs, and the dirt ran on a slope from that bent down about one-half way to the next bent. The stringers running from the bent standing one-half way up in the dirt to the bent wholly covered up were 32-foot stringers. The stringers from the bent partly covered with dirt to the bent outside were 16-foot stringers. Johnson helped shoveling on the dump when he had nothing else to do with building or raising trestles. The morning of April 20th Johnson was on the dump with the dump-men filling up dirt under the ties where it had sagged away during the night, when Murdock came down with the men from the cut for the purpose of digging a trench between the two last trestles then standing. There was then four more trestle-bents already built and lying on the ground.

When Murdock came down with his men from the cut in the morning he told Johnson to raise the remaining trestles and put them in position. Johnson, with the assistance of plaintiff and Peterson,

then first took out the long stringers lying between the bent entirely covered with dirt and the bent standing in the dirt one-half way up and in place of these long stringers put in 16-foot stringers, resting with one end on the dirt at the upper end of the dump.

The ropes with which the long stringers were tied to the cap were untied and probably not tied on after the short stringers were put in. He thereafter, while plaintiff remained on the dump leveling the dirt and filling up under the ties and the track, with the assistance of one Peterson, went to work to raise three more trestle-bents, which was done by aid of block and tackle, one of the teamsters driving his team up the track and thus aiding in raising the trestles. After each trestle was raised Johnson and Peterson laid stringers on them, as heretofore described, without fastening them in any way whatsoever, unless they were tied with ropes, as heretofore described.

The same men thereupon laid the ties and track onto the stringers. The stringers used for the two first trestle-bents erected
47 that morning were short stringers. None of the trestle-bents erected that morning were provided with longitudinal bracing, nor were there any chucks on the stringers or any bolts on either side of the cap, nor were the stringers bolted or nailed to the caps, nor were the ties bolted or nailed to the stringers.

All of the trestle-bents erected that morning were leaning in toward the dump. The one farthest from the dump about eight inches or one foot, the next one about the same, the next one about one foot and a half, and the next one about two feet or two feet and a half. Johnson cannot remember whether any of the stringers on the trestle-bents erected that morning were tied with ropes, but plaintiff saw ropes tied on one or two pairs of them on one side when he went out with the stringers as hereinafter stated.

At this time there was then five trestle-bents standing, one of which was covered with dirt one-half way up and all the other wholly uncovered. None of the trestle-bents were provided with footings, nor were they dug into the ground, but were placed on top of the ground, except one, one leg whereof, on account of a slant in the ground, was partly dug in. There was then only the sixth trestle left on the ground. Johnson placed the lower part of this trestle about twenty-two or twenty-four feet away from the last trestle standing; placed sticks in front of the legs and fastened the rope and tackle in the cap which was lying farthest away from the trestle-work and caused it to be raised in this way by aid of horse-power, having first secured the cap with a guy rope to a stick placed some distance ahead.

This last trestle was heavier than the others and was provided with a footing. Up to this time the plaintiff had taken no part in the work of building or placing in position the trestles which were erected that morning nor in shoving out stringers on them nor in having the ties or track on them, but had been busy at the dump shoveling and tamping, and had paid no attention to the work on the trestle beyond him. About this time Murdock, whose crew from the cut had got through digging the trench and who had taken

his men back into the cut, came down on the dump, where plaintiff and Peterson were then standing shoveling. The long stringer which Johnson had taken out at the end of the dump was then lying beside the track on the dump. On the track beside these stringers were lying a couple of rollers. On going down Mr. Murdock ordered plaintiff to take hold of those stringers and help to shove them out, so as to get the stringers out before the cars should come down with the dirt. Charlie Peterson and plaintiff then took hold and lifted the stringers upon the rollers laying on the track, and plaintiff and Peterson commenced to shove the stringers on the rollers, Mr. Murdock assisting them until the last roller was passed, when one of them took and placed it in front, and thus the work of
48 shoving them out proceeded. The track was laid only one-half way out between the two last bents standing and on which stringers were laid, and as the front roller dropped from the track down onto the stringers Mr. Johnson came up on the trestle-work. At the same time a car came down from the cut and Mr. Murdock went back towards it, while Johnson took his place, and the work of shoving the stringers out proceeded until the front roller struck the rope with which the stringers already laid was tied to the cap of the last bent standing. The stringers moved were then so far out that they were about to tip for the men. Johnson then called Murdock, telling him that the stringers were going to tip, and that he had better come out and help them. Murdock came out and took hold and told Peterson to go and get a piece of rope, which he did, and Murdock then tied the rope around the stringers which they were shoving out and put one end of the rope around the end of the stringers lying in position and made it tight so they could hold them, and then ordered Johnson to go down on the ground and loosen the guy rope and let the sixth trestle come in a little. Johnson did so. At this time the hind end of the stringers, which were being moved, had left the track, and plaintiff knelt down on the stringers and held down the end of one of the stringers with both his hands, while Murdock had hold of the rope. After Johnson had got down on the ground and loosened the guy rope and let the bent down a little Murdock asked if it was far enough in, to which Johnson answered yes, and he tied the guy rope. Mr. Murdock then eased up on the rope so as to let the stringers down onto the cap of the bent then about to be raised, and just as the stringers touched the cap the whole trestle-work fell down in towards the dump, the only trestle remaining standing being the sixth one, which was held up by the guy rope and the trestle which stood partly buried in the dirt and perhaps the one nearest beyond this. The fall was not occasioned by the breaking of any portion of the appliances; nothing broke. When the trestle-work fell down to the ground plaintiff fell with it and was injured.

One of his legs was fractured in two or more places; one of his arms broken near the wrist. He received severe wounds and contusions in his head, and was made totally blind in one eye.

Plaintiff had seen parties raising the trestle that morning, but did not notice how they were built. He had never worked on trestle-

work before, and had no knowledge of how such work should properly be built or secured in order to make it safe, nor had he any knowledge of whether any longitudinal or other bracing or any fastenings other than what was used at the place was necessary in order to make the trestle-work safe to go out on. He did not know and could not see from the place where he was working whether or how the trestles were braced or how they were secured; but the trestles were in sight from the dump where he was working
49 from the time he commenced to work. He had no knowledge of the trestles erected that morning leaning in towards the dump. He did not know Johnson before he was working out there, except while working at Douglas hill, in the city of Minneapolis; knew nothing about his want of experience in building trestles; did not know he was not a trestle-builder or a carpenter, but knew in a general way what he was doing at the works. When the trestle-work which fell down was again erected by the defendants longitudinal bracing- between the different bents were used.

On cross-examination of the witness Johnson, evidence was adduced over the objection of plaintiff that there was at the place where the trestle-work was being built sufficient materials of all kinds for the work and for the bracings and sufficient of bolts, nails, and spikes of all sizes and sufficient tools and implements for the work.

Plaintiff further introduced testimony by four civil engineers, who were graduates as such and who had had large experience in bridge-building and trestle-building, and by one practical railroad contractor, who had himself been building trestles of a similar kind to the one in question, tending to show that the trestle-work in question, even supposing the stringers had been tied with ropes to the caps of the different bents, was unsafe to send people to work upon, pushing out stringers of the length and dimensions testified to; that in handling the stringers in the way it was shown they were handled, and particularly by having the bents out of plumb and by pushing the stringers out over the center of the cap, it would tend to throw the weight of the stringers on the outer edge of the cap, and that this would naturally push the bents further the way they were leaning, which was in towards the dump. The fact that round timber was used, which was cut down to have a flat surface only five inches, would also have a tendency to push the trestles inwards, in the opinion of the experts.

That in order to make the structure reasonably safe the stringers should either have been bolted to the caps or a plank should have been bolted to the stringers on each side of the cap, thus making a chuck, commonly called, or else spikes should have been placed in the stringers below on each side of the cap, or else there should have been provided longitudinal bracing between the different bents, which could have been done either by running a brace from the top of a leg on one bent to the foot of the leg of the next bent and another brace crossing this or else by placing longitudinal cross-braces from cap to cap. If either one of these precautions had been taken the structure would have been reasonably safe to send men out upon fer the purpose of pushing out stringers, as was done.

Plaintiff's witness, Johnson, testified that plaintiff had assisted in the work of raising the trestles the morning of the accident,
50 but plaintiff positively denied that he took any part in the erection of the trestles or in any work on them that morning until after Murdock ordered him out with the stringers a short time before the accident. On these points Johnson and the plaintiff were the only witnesses for plaintiff.

Counsel for the defendants then moved the court to instruct the jury to render a verdict for defendants on the ground that plaintiff had failed to make out a cause of action against the defendant-; which motion the court denied, but stated that he would permit the defendants to renew said motion when the evidence was all in and before the court should charge the jury.

Counsel for the defendants then and there duly excepted to the ruling of said court in denying said motion.

Defendants then proceeded with their evidence tending to show that the fall of the trestle was not occasioned by the breaking of the structure or any part of it or any of the appliances.

Nothing broke; the fall was occasioned while Murdock, plaintiff, and Peterson were endeavoring to extend the last pier of stringers to the bent which Johnson had just tied with the guy lines.

That the men were under no stress for time within which to put up this temporary trestle.

That the defendant John Woods attended to the outside work of the defendants at and during all the time mentioned, and retained and conducted the supervision of the work in person, and was at this point and the other points where the other crews were at work, viz., the crews under Mahoney and under Frank Woods, as a rule, every week day, or at least five times a week, and gave directions and made suggestions to the foreman themselves.

That the foreman, including the foreman Murdock, had the privilege of setting men to work if any should apply and there was a place for them on the work, or, if it became necessary for any reason, he could give them a bill of their time and send them to the defendant for their pay, which was equivalent to a discharge.

That beyond this he had no power in the hiring or discharging of any man; that he did not fix the wages of any man; that he simply did the work of any foreman on the work; kept the time of the men and saw that they were about their work and doing what they were employed to do; that he took hold with the men whenever and wherever occasion presented itself and when his assistance was required in assisting the men in doing what they were engaged upon.

That he did not employ the plaintiff beyond telling him when he applied to him that morning of the 2d of April that he could go down on the dump to work with Johnson; that at the time
51 of the accident it appeared by the defendant's testimony that the plaintiff was upon this temporary trestle, as were also Charlie Peterson and the man Johnson, when he, Murdock, was called by Johnson and went out there to help hold the stringers.

That no express directions were given to plaintiff or to either of the men to go out on the structure.

Plaintiff, Johnson, and Peterson performed this work in this way as a part of the work in constructing the road; that the trestle was a temporary trestle only, and was only to run out empty Petler cars on, carrying a cubic yard of dirt, after they were dumped.

The trestle-bents were left in the fill. It also appeared by the defendants' evidence that the defendants at all times furnished and provided sufficient of all kinds of tools and implements and material for the work, and the defendants Woods and Mr. Murdock told the men and told the plaintiff to be careful to avoid accidents. Several witnesses, as experts, also testified on behalf of the defendants, at least five in number, as experts, to the effect that the structure, as described, was a reasonable safe place and structure for the purpose for which it was constructed if tied with ropes around the stringers to the caps, and having seen and used the same kind of trestle-work themselves, some of whom testified that they considered such a temporary trestle-work to be superior and safer than if braced with longitudinal braces, or if provided with chucks, or if the stringers had been spiked to the caps, as the tendency of the earth was to crowd the trestle forward away from the dump as the filling progressed.

The defendants also showed that the man Johnson did his work well, and, after being shown how to put up and build temporary trestle on Lowry hill and Douglas hill, had always built the temporary trestles and performed his work well; that the foreman, Murdock, performed his duties and did his work well.

The defendants also introduced some medical testimony with respect to the character and extent of plaintiff's injuries and the future use of his injured members.

Defendants also offered in evidence the following documentary evidence:

1st. Judgment-roll and record in the district court in and for the fourth judicial district, county of Hennepin and State of Minnesota, in the case of August Lindvall, plaintiff, *vs.* Woods & Lovejoy, defendants, being a certified copy of said judgment-roll, complaint, answer, reply, and amended reply therein.

Also mandate of the supreme court of the State of Minnesota in the same cause.

52 Also bill of costs in said supreme court, upon which judgment for costs was therein entered, and a mandate and transcript of judgment therefor to said district court after determining said cause in the supreme court.

Also minutes of the proceedings in the district court in the trial of said cause therein.

Also case and bill of exceptions made up after the trial of said cause in said district court proposed by said plaintiff and amended by said defendants and finally settled by said district court, with stipulations of the parties in said cause, being a case settled and signed, purporting to contain all the evidence offered upon the former trial of said cause in said district court.

And certified copy of the paper book in said cause used in said supreme court, upon which said cause was argued in said supreme court and considered and determined therein.

Said evidence was offered upon said defendants' plea in bar to this action, and which evidence was objected to by said plaintiff and the objection thereto sustained by said court.

To which ruling of the court in refusing to receive said evidence said defendants duly excepted.

Which evidence so offered and rejected showed indisputably the following facts:

That the same plaintiff had brought an action against the same defendants, upon exactly the same cause, for the same injury, in the district court of the State of Minnesota for the county of Hennepin, a court of general jurisdiction in said State.

That upon the trial of said cause in said district court, after the plaintiff had put in all his evidence and rested his case, the defendant moved said district court to dismiss said action upon the ground that the evidence of plaintiff did not make out a case against said defendants; which motion, after due and solemn argument by both defendants and plaintiff and upon due consideration, was granted by said district court and said action was dismissed.

That thereupon the plaintiff procured a stay of proceedings and made up and procured to be settled and signed by the judge who tried the case a settled case and exceptions containing all the evidence, and upon the pleadings and such settled case made a motion for a new trial in said district court; that said motion for a new trial, after due hearing and consideration, was denied by said district court.

That thereupon said plaintiff, under the practice and procedure in the Minnesota courts in such cases, appealed to the supreme court of Minnesota from said order denying the motion for a new trial and carried to the supreme court upon such appeal the pleadings and all the evidence given in the court below.

53 That the case upon said appeal was duly heard and tried in said supreme court, and the decision and order of said district court was by said supreme court duly and in all things affirmed.

That thereupon a mandate issued from said supreme court to said district court for further proceedings in accordance with such decision, and upon the filing of said mandate judgment in said cause was given and entered in said district court as follows, to wit:

"STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court, Fourth Judicial District.

SEPT. 5TH, 1889.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods & Lovejoy, Defendants.

Judgment.

The above-entitled cause, being at issue upon the complaint of the plaintiff, answer of defendants, and reply of the plaintiff, and being regularly on the calendar of the above-named court for trial at the December, 1888, general term thereof, came duly on for trial before the Hon. J. P. Rae, judge of said court, and a jury.

The plaintiff appeared by Messrs. Pierce, Arctander & Nickell, his attorneys, and the defendants by Messrs. Shaw & Cray, their attorneys. Thereupon, after the plaintiff had duly opened his case and introduced his witnesses and evidence in said cause and rested his case and before the final submission of the case, the attorneys for said defendants moved said court for a dismissal of said cause upon the ground that said plaintiff had failed to make out a case against said defendants, which motion was granted.

And said cause having been afterwards appealed to the supreme court of Minnesota by appeal from an order of this court denying said plaintiff's motion for a new trial therein, and said supreme court having duly affirmed said order denying a new trial and having duly issued its remittitur to this court, which had been duly filed in this court, now, on motion of Messrs. Shaw & Cray, attorneys for said defendants, it is ordered and adjudged that said action be, and hereby is, dismissed, and that said defendants do have and recover of said plaintiff the sum of seven and $\frac{53}{100}$ dollars for their costs and disbursements of said action duly taxed and allowed herein.

By the court:

C. B. TIRRELL, *Clerk.*"

54 The evidence then being closed, counsel for defendants moved the court, upon all the evidence in the case, to instruct the jury to render a verdict for the defendants, which motion was denied by the court, and to which ruling counsel for the defendants duly excepted.

Counsel for the respective parties then addressed the jury.

The court then charged the jury as follows:

GENTLEMEN OF THE JURY: This has been a very long and tedious case, but it is interesting from the fact that many important legal questions have arisen, aside from the general interest taken in the testimony with reference to the facts.

You have given it such patient attention that it does not seem to

me necessary to go far into details of the testimony as brought out before you. The counsel have very thoroughly and exhaustively presented the several theories upon which a verdict is asked at your hands.

Now, what is the case, gentlemen? The plaintiff, as a laborer, brings this action to recover damages against defendants for injuries which it is alleged he sustained by reason of the negligence of the defendants in the course of his employment—that is to say, he claims that the injuries he sustained were the natural con-equences of the negligence of the defendants.

That their negligence was the proximate cause of his injury. It appears that the defendants were contractors, railroad contractors principally, and in the spring of 1888 they had a contract to grade somewhere about ten or twelve miles of the St. Paul and Duluth railroad, straightening the track, and in doing this it was necessary to do considerable grading outside of the old track. Upon this work were several gangs of men under foremen—at least two; one under the charge of Mahoney (not a very large gang), the other near Gladstone, under the charge of Murdock, in which gang the plaintiff worked. The work to be performed by Murdock's gang near Gladstone was to make a cut through a hill and fill up several hundred feet of low ground, partially marshy, and the manner of doing this work was by extending, as fast as the excavation was made, trestles and filling in these trestles according to their height, and thus making the grade continuous.

The plaintiff was employed on the work about the 2d of April, 1888. I might say that in doing this work the defendants, under Murdock, had men who worked in the pit, men who worked on *to* dump, and a man by the name of Johnson, who was assigned to frame bent of the trestle-work which was to be put up and erected, and who, with the aid of other laborers, was to place stringers of different lengths upon these bents.

55 That upon this temporary trestle-work what is called a Petler car railroad track was to be constructed in order to bring out on it the cars, each of which cars contained about a cubic yard of dirt excavated from the cut.

The plaintiff claims that he was injured by the negligence of Murdock, who represented the company, in setting him to work upon an insecure and unsafe structure—this trestle, the erection of which Murdock had entrusted to Johnson, an employé; that Johnson was an incompetent person for the work, and that he is entitled to recover for the injuries sustained by reason of that negligence.

The defendants deny that there was any negligence on their part; deny that Mr. Murdock, if the injuries resulted from his negligence, was a representative—a vice-principal; also deny that Johnson was an incompetent person within their knowledge, and the defense urged is that if there was any negligence and the plaintiff was injured it was either the negligence of himself or of his co-employés working with him.

The issue as presented by the pleadings affirming and denying the facts, as I have stated to you, are to be determined upon the evi-

dence which has been introduced tending to support the several claims and the law as I deem it proper to give you. You will thus see, gentlemen, that negligence is the gist of this action, and it may not be improper for me at this time to indicate to you what is negligence—what is legal legligence.

Negligence is defined to be the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the particular situation or doing what such a person under the existing circumstances would not have done.

That is the definition which commends itself to most courts as being concise and satisfactory. Now, this negligence being alleged, the burden of proof is upon the plaintiff by the preponderance of the evidence to satisfy you that there was negligence on the part of the defendants or any one who represented them.

This negligence cannot be presumed. It must be affirmatively proven, and it is to be determined by you upon the preponderance of all the evidence. It is not sufficient that the plaintiff proves that he has sustained damages by reason of some omission of the defendants. He must also prove that the defendants in such omission violated a legal duty or obligation which they owed the plaintiff by reason of the relation established between them of employer and employé. The defendants are not the insurers of the safety of the plaintiff. They do not guarantee absolutely his safety, and it is necessary for the plaintiff to establish by evidence facts and circumstances from which it may fairly be inferred that his injury resulted
56 from the want of some precaution which the defendants might and ought to have resorted to; and, in addition, the plaintiffs should also show with reasonable certainty what particular precaution should have been taken by the defendants.

To prove his cause so as to enable the plaintiff to recover he must satisfy you *that* by the preponderance of evidence:

1st. Of defendants' negligence in failing to perform some duty which they owed him.

2d. That the defendants' negligence was the proximate cause of the injury which he sustained; and you have then what you may call (thirdly) the question of the incompetency of Johnson, who, it is claimed, was a fellow-servant and was, to defendants' knowledge, incompetent for the discharge of the work which he was set to in connection with the plaintiff; and if those points — resolved in favor of the plaintiff, then another question will arise, to which I will call your attention hereafter.

Now, what is the proximate cause? For the plaintiff must prove that if he was injured as claimed the negligence of the defendants was the proximate cause of the injury. The proximate cause of an injury is that cause which immediately precedes and directly produces the injury, without which the injury would not have occurred; and it is claimed here that this injury was the natural sequence of the negligence of the defendant, without which it would not have occurred.

This raises a question which it is necessary for me to instruct you

upon, and that is the duty of the employer, in this case the employers, and the duties of the plaintiff.

The law imposed upon the defendants the duty to use ordinary care to select and retain competent servants or co-employés with the plaintiff and not to subject him to the negligence of incompetent fellow-workmen, and also to exercise ordinary care to furnish a reasonably safe place for plaintiff to do his work and a reasonably safe structure upon which plaintiff was required to go to do his work, such as is reasonably calculated to insure safety when doing his work; also to use ordinary care to discover any defect, if such exists, in the structure upon which the plaintiff was required to go in performing his work; to use ordinary diligence to see that the place where the plaintiff's work called him was in such condition as from the nature of the work and of plaintiff's employment he had a right to expect it would be kept, for the plaintiff had a right to assume that all reasonable attention would be given by defendants to his safety, so that he would not be carelessly and needlessly exposed to risks which might be avoided by the exercise of ordinary care and caution. I say ordinary care, and it is necessary for me to define what is meant by ordinary care. Ordinary care is defined to be that amount of care which an ordinarily prudent person would exercise under the same circumstances—

57 That is, such care as, taking into consideration all the exigencies of the particular service, ought reasonably to be observed; and the claim here, you will recollect, gentlemen, is that this structure which has been exhibited to you in the models was insecure and unsafe, the bents and stringers not properly tied, braced, and bolted so as to render it reasonably safe, and that the defendants, through Murdock, their representative, as the plaintiff claims, failed to exercise ordinary care and caution in making that trestle-work safe.

If the defendants have exercised or if the evidence shows to your satisfaction that the defendants exercised all the care and caution which is imposed upon them for the safety of the plaintiff in doing his work, the law does not hold them liable for a defect in this trestle or structure which could not be discovered by the exercise of reasonable care—that is, even if this structure was insecure, unsafe, and defective, the law does not hold the defendants liable, for any such defect was unknown to them and which could not be discovered by them in the exercise of reasonable care. Now, on the other hand, the plaintiff assumed certain risks by virtue of his contract of service and the relation established between the defendants and himself. The plaintiff assumed all the risks incident to the character of the work which he was employed to do, and in the absence of any statute (and we have none in our State relative to the individuals and corporations outside of railroads) there is included the risk of injury by the negligence of his fellow-workmen in the same common employment.

The general doctrine is well settled that an employer is not liable for any injuries to an employé caused by the negligence of a co-employé in the same employment. So it is necessary for me to instruct

you, who are fellow-workmen in the same common employment. Fellow-workmen are in a common employment when each of them is employed in a service of work of such a kind that all the others in the exercise of ordinary sagacity ought to be able to foresee when accepting employment that it may probably expose them to the risk in case he is negligent.

I might say here that the theory of plaintiff is that Murdock was a vice-principal—as it is called, a substitute—of the defendants, in charge of that work, and that he was not a co-employé, and that the rule which I have laid down to you with reference to the assumption of risk on the part of plaintiff does not apply to him, for he was not a co-employé of plaintiff. The duties imposed by law upon defendants, which I have stated to you with regard to selection of workmen and a safe structure, cannot be delegated by the employer to any one, whether a fellow-employé of the injured party or not, so as to exempt the defendants from all liability for injury sustained by the negligent exercise of their duties.

58 The duties may be delegated, but if this is done the person to whom they are delegated and to whom the execution of them are intrusted becomes the vice-principal or substitute of the employer, and if he negligently performs them and a workman of the common employment to whom the master owes these duties is injured he has a right of action for damages on that account from the common employer; in other words, the employer is responsible for the negligence of an employé who stands as his direct representative, invested with his own authority over a particular business and over inferior employés, and the latter, when injured by such negligence, are not barred by the doctrine of fellow-employé, as I have stated it to you.

It is claimed, I say, on the part of the plaintiff, first, that Mr. Murdock was a vice-principal. Now, when can a person be said or be called legally the vice-principal of another so as to make the employer responsible for his acts—his negligent acts? In this case it is for you to determine whether, as is claimed on the part of the plaintiff, Mr. Murdock was the representative of the defendants, and, if he was, whether the plaintiff has satisfied you by the preponderance of evidence that the injury occurred on account of his negligence.

When a foreman of a gang is vested with the entire management, control, and supervision of a particular work to be done, so as to say not only what shall be done but how it shall be done, and he had full power and authority to command the men under him in their work, and the work is under his practical direction and control, save and except as he may receive directions from time to time from his employer, and ordinarily there is no one else present and authorized to superintend and direct the work of the men, then he represents the employer—he stands for the employer. It is claimed that within that principal the foreman, Murdock, was the representative of the defendants; and you will recollect, gentlemen, that testimony has been offered tending to show that Mr. Woods, of the firm of Woods & Lovejoy, one of the defendants here, had the su-

perintendency of this twelve miles—ten or twelve miles of road—which was to be graded and built, and that occasionally from time to time, according to the testimony of others, twice or three times a week he visited these different gangs of men, at least this gang under the charge of Murdock.

Now, in regard to the claim made by plaintiff that Murdock was a vice-principal, if the preponderance of all the evidence satisfies you that the defendants delegated to Murdock, although he is called foreman, the care and management of the work to be performed at this cut and the work to be performed by this gang of men was under the practical direction and control of Murdock, subject only to the directions given to him personally as the local foreman
59 from time to time by the defendant Woods and to the latter's oversight and examination when he occasionally or two or three times a week came to the work, and if Murdock had the authority to employ and discharge the men working there in his gang and had direct control of their movements so far as concerned the work in his chage, and that ordinarily there was no one else present and authorized to superintend and direct the work or the laborers, then he represented the defendants. "He stood," as was expressed by a distinguished judge, "in their shoes, whether they fit him or not;" and his negligence is so far the defendants' negligence that they are responsible to the plaintiff on account of it to the extent he was injured in consequence thereof. In other words, if this work required care and oversight for the proper performance thereof and the evidence satisfies you that Murdock for that purpose was placed in charge of it, and he was clothed with the duty of supervising and managing the work and had the power of control and direction over the gang of men under him, including the plaintiff, in the details of the work, and the plaintiff and others were required to obey his commands, orders, and directions, then in executing that duty of control, direction, supervision, and management Murdock represents the defendants, and for his negligence in performance thereof the defendants are liable if his negligence was the proximate cause of the plaintiff's injury, whether he is designated as a foreman, construction boss, or by any other name.

On the other hand, if you should believe from the evidence that Murdock was simply the foreman of the gang in which the plaintiff was employed, both he and plaintiff, as occasion required, working side by side, the former merely leading the work and giving immediate direction to it and to the men, sometimes in the presence of Mr. Woods as superintendent, then Murdock and plaintiff were fellow-employés in a common employment, and defendants are not liable or responsible for Murdock's negligence.

And if you believe that he was simply a foreman, as I have described to you, then the defendant would be entitled to a verdict in this case, unless the plaintiff has proved that the defendants were negligent in the employment of an incompetent servant, who built the structure which it is claimed was unsafe, and that his negligence was the proximate cause of the injury. All of this is given to you with the understanding that you should not further find that there

was contributory negligence on the part of the plaintiff himself, to which I shall briefly call your attention hereafter.

You will recollect that one claim here is that the defendants failed in their duty to employ a competent person—that is, that Johnson was an incompetent employé for the work to which he was assigned.

60 It was the duty of the defendants, as I briefly stated to you, which they personally owed to the plaintiff, to use ordinary care to select fellow-employés of sufficient care and skill to make it probable that he would not be subjected to injury from their failure to possess these qualities, and *be* the defendants themselves or any representative who was authorized to employ the men failed to perform this duty they would be liable to the plaintiff for any injuries sustained in consequence of such negligence or incompetency on the part of fellow-workmen thus negligently employed, as might be reasonably anticipated as not unlikely to happen from such incompetency, provided they knew of it or could by the exercise of ordinary care and caution on their part have ascertained it.

You have heard the testimony, and I shall not repeat it, in regard to the competency and skill of the workman Johnson, who, all the testimony tends to show, was designated to frame the bents, and who, it is claimed on the part of the plaintiff, the testimony further tends to show was designated as the person to erect them with the assistance of other employés that he could call upon, and to place the stringers in position upon them so that these Petler railroad tracks could be laid out for the purpose of the work.

Now, it is for you to determine from all the evidence, the burden of proof being upon the plaintiff, the alleged incompency of Johnson by the preponderance of evidence, and also whether he was the person designated for that particular work of putting that structure in condition so that it could be operated as a temporary trestle upon which the dirt could be hauled out and filled in. Of course, if he was an incompetent person and his incompetency was known to the defendants, and if the injury to the plaintiff was occasioned by the negligence of the workman Johnson, in that behalf, then the defendants would be responsible and the plaintiff would be entitled to recover for such damages as you think he is justly entitled to under the circumstances of the case.

But the mere fact that this thing fell down, even if you should believe that it was defective and unsafe, is not sufficient evidence to warrant you in finding that the defendants had knowledge that Johnson was an incompetent person for this service—that is, the mere fact that — this particular instance the defect, if there was any defect or insecurity of the structure, was due to a failure of skill on the part of Johnson, that alone is not sufficient to warrant you in finding that defendants knew that Johnson was an incompetent person. You must take all the evidence in the case and determine what knowledge the defendants had preceding this work here before Johnson was employed by them, and from all the evidence, all the attending circumstances, decide and settle the issue as to whether

he was incompetent for the work intrusted to him, and, if so, if defendants had knowledge of such incompetency.

61 Now, if you should find all these issues in favor of plaintiff, or if you should find that Murdock was vice-principal of the defendants, and that his negligence was the proximate cause of this injury, then the plaintiff would be entitled to a verdict; or if you should find that on the other hand that Murdock was a mere foreman and not a vice-principal, but that defendants were negligent in employing Johnson, an incompetent person, and that his injuries were caused by such negligence, then the plaintiff would also be entitled to a verdict, unless he himself was guilty of negligence which contributed to cause his injuries.

If Lindvall went out upon the structure before the time of this accident, as it is claimed, several times, and if he worked upon the dump in view of it, and knew what was going on there, it was his duty to exercise care and caution on his part to avoid any danger, and it was his duty to see that he was not exposing himself unnecessarily to danger in doing this work. It is true that he had a right to rely upon the superior information of the defendants, or the person who represented them, or Johnson, if you believe that he was designated to put up this structure; but if you believe that by the exercise of reasonable care and caution on his part he might have discovered that this structure was unsafe, if you should believe it was unsafe, and nevertheless went out upon the structure, then he contributed to his own injury, and he cannot recover, though you should find that the defendants themselves were negligent.

Now, gentlemen, I think I have presented this case to you pretty thoroughly, so far as the claims made and the theories advanced by the plaintiff and the defendants.

If you should come to the conclusion that the evidence, the preponderance of the evidence, proves no negligence on the part of the defendants, then they are entitled to the verdict. If, on the other hand, you believe that the preponderance of the evidence proves negligence on the part of the defendants, then plaintiff would be entitled to a verdict, unless guilty of contributory negligence, and the question then is presented, what amount should the plaintiff recover for the injuries sustained?

Now, I was very sorry to hear the gentleman who concluded the summing up of the testimony advance the idea that the amount, if you should believe that the plaintiff was entitled to a verdict, should be fixed by you so that defendants could not have a review of this case in a higher court.

That is not the rule or measure of damages for personal injuries, and if I believed that any such a verdict would be returned by you, or if any verdict based upon any such information is returned and justice to that extent thwarted, that verdict would be set aside before the ink recording it was dry.

62 That is not the rule of law upon which litigation of this sort ought to be tried. It is not a measure for the damages which a person suffering from personal injury through the negligence of another is entitled to recover.

There are certain elements which the jury are to take into consideration in determining the amount the plaintiff injured under such circumstances should recover, if he has satisfied the jury that his injury was sustained by the negligence of a person who owed him a legal duty, and they are all founded upon compensation. Nothing else, gentlemen, but compensation for the injuries sustained is the plaintiff entitled to recover. Of course, that to some extent is left to the sound judgment and discretion of the jury based upon all the evidence in the case and the facts disclosed during the progress of the trial. Of course, the plaintiff is entitled to compensation for loss of time on account of the injuries sustained. He is further entitled to compensation for pain and suffering. Now, that he must be left entirely to the jury, what would compensate a person for pain and suffering? You cannot measure it in dollars and cents; at least it must be left to the sound discretion of the jury and their sound judgment, bearing in mind all the time that it is compensation and not what may be called smart money which he is entitled to receive.

He is also entitled to compensation for any temporary disability, temporary injury, or permanent injury, and the testimony here tends to show that he, at least, never will regain his eyesight, so far as one eye is concerned; also what impairment there may be to his bodily strength, for the evidence here disclosed beyond any dispute that one leg is shorter than it was.

He is not the same that he was before the injury. At the same time you must graduate or at least measure the damages on the theory of compensation only, that being left to your sound discretion, gentlemen. It is for you to say on the whole case, if you believe the plaintiff is entitled to a verdict, what amount will compensate him for the injury, bearing in mind that you are to decide this case upon the strict legal rights of the parties and the cold facts which have been developed here in testimony, not upon sympathy for the plaintiff, who is in affliction; that is not an element to be taken into consideration by the jury, for jurors and courts would be less than human if they did not sympathize with a fellow-man in affliction.

You can take the case, gentlemen.

I have stated to you, gentlemen, as to this question in regard to the amount of the verdict, if you should think the plaintiff is entitled to any amount, that I have control of your verdict; and, although I do not mean to say but what in the exercise of sound discretion and judgment you may think that his compensation should be less than such amount and return such a verdict,
63 still when it has been intimated, as I say, to you by counsel that you should find less than such an amount, because that would prevent the defendants from having a review of this case, why any verdict which I can see is returned on such basis would not stand for a moment. I should set it aside.

There have been several requests made here by the counsel for the defendants—I have given some of them—which I will read to you.

Defendants' Requests.

II.

The fact that the trestle in question belonged to the defendants, was being used upon their work, and fell, injuring plaintiff, is not of itself sufficient to charge the defendants.

III.

The defendants cannot be charged unless the injury to plaintiff was caused by their own personal negligence; which request the court gave, but qualified by adding to it as follows, "That is, from their own personal negligence or the personal negligence of other employés who represented them;" to which qualification counsel for defendants duly excepted.

IV.

If the approximate cause of injury to plaintiff was either—
First. Any contributory negligence by the plaintiff himself; or,
Second. Negligence by or on the part of his co-employés; or,
Third. Any contributory negligence by or on the part of the plaintiff and his co-employés together, then the plaintiff cannot recover.

V.

If you find from the evidence that in the employment of plaintiff there was no express limitation of his employment to any particular kind of work, then you will not be justified in finding that his employment was so limited, and this would be so whether he was in fact employed by the defendants or by the foreman, Murdock.

VI.

The simple fact that when the plaintiff was first employed upon this work he was set to work upon the dump does not of itself justify you in finding that his employment was limited to work at the end of the dump or upon the dump itself. Plaintiff would be required to establish by evidence the fact that his employment was limited, and if he has not done so by a preponderance of the evidence you cannot so find.

64 VI½.

If plaintiff's employment was not limited to a particular kind of work he might reasonably be required to assist in any work upon the job in which his assistance could be of use.

VII.

The fact that a man is employed as and exercising the functions of a foreman of a crew of men upon such work as this does not necessarily make him a vice-principal and does not put him, as to

the men under him as foreman, in the place of the employer or principal.

VIII.

Nor does the fact that a foreman sometimes upon the work hires men who come to the place where the work is being carried on and apply for work or discharge men make him a vice-principal or put him in the place of the principal who is sued as defendant in his relation to other employés over whom he is foreman.

IX.

If the principal or defendant himself retains in his own hands general supervision of such work as this, visiting it frequently and giving instructions to his foreman with respect to it, and the business of his foreman is to direct the crew of men under him when and to what place upon the job they shall work and see to it that they work diligently and faithfully, directing and helping them about such work, then the foreman is a co-employé with such other laborers constituting his crew.

X.

If in this case Murdock was such foreman, then he was a co-employé with plaintiff, and the defendants would not in that case be responsible for any injury arising from or caused by any omission or negligence of Murdock in and about the details and doing of such work.

XI.

It is not claimed that the man Johnson was a vice-principal or even a foreman, but it is claimed by plaintiff that special work was assigned to him to do separately, for the manner of performance of which plaintiff could not be held responsible by reason of his being a co-employé.

The man Johnson certainly could not be held to be specially and separately employed for or put to any work except such only as he had to do separately, by himself, without the aid of his co-employés.

65 If you find that Johnson had any such special or separate work assigned to him, and that he performed that work effectually and well, then you could not see that he was incompetent in that regard, nor could the plaintiff in such case or for that reason impute or claim any negligence on the part of the defendants.

XII.

In all or any work upon and about which the plaintiff and other men were employed and actually worked in common, requiring and receiving their joint efforts and labor in its accomplishment, the plaintiff and such other men were co-employés.

XIII.

If you find from the evidence that the men employed by the de-

fendants upon the job in question, consisting of the foreman and the crew under him, including the plaintiff, were employed in and about the common purpose and object of grading a road-bed for a railroad—that is, making a cut through a hill—and with the material or dirt taken from the cut filling in and constructing a dump upon and through lower ground, and using in and about this work small dump-cars for the purpose of carrying such dirt from the cut to the dump, and that in and about doing this work it was convenient and required to have and use temporary trestle-work upon which to lay track for the carrying of such cars, and that such trestle-work was put up and adjusted upon the ground from day to day or from hour to hour, as the work progressed and required it, by the men or laborers employed upon such job, in order to facilitate such work and enable them to do and complete it as designed, and that the defendants furnished to said employés all necessary and sufficient material for the doing of such work and for the constructing and placing in a secure manner of such trestle-work, so that it was furnished from day to day when it was needed, and to make and fasten and use the same in a secure manner, then you are instructed that the defendants would not be responsible for any omission, failure, or neglect on the part of their said employés or any of them in or about the use of such materials or in or about the construction or placing or securing of such temporary trestle in the course of their said employment.

Which request to instruct the jury was refused by the court, and defendants' counsel duly excepted.

XIV.

If you find the facts to be as stated in the last, 13th, request, and you further find that the plaintiff and his co-employés were at the time of the accident actually engaged in the erection and placing upon the ground and adjusting a portion of such temporary trestle, and that in so doing they or any of them failed, 66 omitted, or neglected to place or put upon such trestle sufficient bracing or fastening to hold the same up while they were so engaged, by reason of which a portion of said trestle fell, causing injury to the plaintiff, the defendants are not responsible or liable for such injury nor at all.

Which request to instruct the jury was refused by the court, and defendants' counsel duly excepted.

Counsel for defendants also further duly excepted to all and every part of the charge of the court wherein the court submitted to the jury to determine the question as to whether the foreman, Murdock, was a vice-principal.

The jury thereupon retired and returned a verdict in favor of the plaintiff for the sum of thirty-eight hundred ($3,800.00) dollars.

Upon motion of defendants a stay of execution was ordered for the usual period of forty-two days.

Defendants duly made and presented their petition to vacate, annul, and set aside said verdict and the judgment entered thereon and for a new trial of said action; which petition was duly allowed

and signed by the honorable judge of said court, before whom said action was tried, and filed in said court.

That on the 18th day of July, A. D. 1891, said action came duly and regularly on before said court upon said petition and motion, and said motion was denied.

To the denial of which motion the defendants' counsel duly excepted.

And because the foregoing matters do not appear of record in said action, the judge who tried this action, finding the same to be true and correct, has signed and sealed this bill of exceptions and ordered the same to be made part of the record in this action.

Signed and sealed this 29th day of July, A. D. 1891.

R. R. NELSON, *Judge.*

To August Lindvall, plaintiff in the above-entitled action, and to Messrs. Arctander & Arctander, attorneys for said plaintiff:

GENTLEMEN: You will please take notice that the above and foregoing is proposed as and for the bill of exceptions in the above-entitled action. You can govern yourselves accordingly.

Yours respectfully, SHAW & CRAY,
Attorneys for Defendants.

Indorsed: July 30th, 1891. Oscar B. Hillis, clerk. Bill of exceptions.

67 And afterwards, to wit, on the same day, the following assignment of errors was filed in the words and figures as follows:

United States Circuit Court, District of Minnesota, Third Division.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods & Lovejoy, Defendants.

Assignment of Errors.

And now comes the above-named defendants, by Shaw & Cray, their attorneys, and say—

That — the record and proceedings in said circuit court in the above-entitled action, and also in the giving of judgment in said action, there is manifest error, in this, to wit:

1. In refusing to grant the motion of defendants' counsel to instruct the jury to render a verdict for said defendant upon the evidence on the part of said plaintiff when he rested his case, upon the ground that said plaintiff has failed to make out a cause of action against said defendants, the denial of which motion and the ruling of the court thereon was duly excepted to by said defendants' counsel.

2. There was also manifest error, in this: The court should have instructed the jury at the close of all the testimony and evidence in

the case to find and render a verdict for the defendants; to the refusal so to instruct and the ruling of the court denying such request defendants' counsel duly excepted.

3. There was also error, in this: The court should have received the evidence offered by said defendants under their plea in bar, which record so offered and rejected showed indisputably the following facts:

That the plaintiff had brought an action against the same defendants upon exactly the same cause, for the same injury, in the district court of the State of Minnesota for the county of Hennepin, a court of general jurisdiction in said State.

That upon the trial of said cause in said district court, after the plaintiff had put in all his evidence and rested his case, the defendants moved said district court to dismiss said action upon the ground that the evidence of plaintiff did not make out a cause against said defendant-; which motion, after due and solemn argument by both defendants and plaintiff, and upon due consideration, was granted by said district court and said action was dismissed.

68 That thereupon the plaintiff procured a stay of proceedings and made up and procured to be settled and signed by the judge who tried the case a settled case and exceptions containing all the evidence, and, upon the pleadings and proceedings and such settled case, made a motion for a new trial in said district court; that said motion for a new trial, after due hearing and consideration, was denied by said district court.

That thereupon said plaintiff, under the practice and procedure in the Minnesota courts in such cases, appealed to the supreme court of Minnesota from said order denying the motion for a new trial, and carried to the supreme court upon such an appeal the pleadings and all the evidence given in the court below.

That said case, upon said appeal, was duly heard and tried in said supreme court, and the decision and order of said district court was by said supreme court duly and in all things affirmed.

That thereupon a mandate issued from said supreme court to said district court for further proceedings in accordance with such decision, and upon filing said mandate judgment in said cause was given and entered in said district court as follows, to wit:

"*Judgment.*

STATE OF MINNESOTA, *County of Hennepin,* } *ss:*

United States District Court, Fourth Judicial District.

SEPT. 5TH, 1889.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOOD and STEPHEN B. LOVEJOY, Partners as Wood & Lovejoy, Defendants.

The above-entitled cause, being at issue upon the complaint of

the plaintiff, answer of defendants, and reply of the plaintiff, and being regularly upon the calendar of the above-named court for trial at the December, 1888, general term thereof, came duly on for trial before the Hon. J. P. Rea, judge of said court, and a jury.

The plaintiff appeared by Messrs. Pierce, Arctander & Nickell, his attorneys, and the defendants by Messrs. Shaw & Cray, their attorneys; thereupon, after the plaintiff had duly opened his case and introduced his witnesses and evidence in said cause and rested his case before the final submission of the case, the attorneys for said defendants moved said court for a dismissal of said cause upon the ground that said plaintiff had failed to make out a case against said defendants, which motion was granted; and said cause being afterwards appealed to the supreme court of Minnesota by appeal from an order of this court denying said plaintiff's motion for a
69 new trial therein, and said supreme court having duly affirmed said order denying a new trial and having duly issued its remittitur to this court, which has been duly filed in this court, now, on motion of Messrs. Shaw & Cray, attorneys for said defendants, it is ordered and adjudged that said action be, and it is hereby, dismissed, and that said defendants do have and recover of said plaintiff *in* the sum of seven and $\frac{53}{100}$ dollars for their costs and disbursements of said action duly taxed and allowed herein.

By the court:

C. B. TIRRELL, *Clerk.*"

4. There was also error in this:

In qualifying defendants' third request to charge by adding the following words, to wit: "That is, from their own personal negligence or the personal negligence of other employés who represented them."

5. There was also error in this:

In refusing the following request by defendants to charge the jury, to wit: "If you find from the evidence that the men employed by the defendants upon the job in question, consisting of the foreman and the crew under him, including the plaintiff, were employed in and about the common purpose and object of grading a road-bed for a railroad—that is, making a cut through a hill and with the material or dirt taken from the cut filling in and constructing a dump upon and through lower ground and using in and about this work small dump-cars for the purpose of carrying such dirt from the cut to the dump, and that in and about the — temporary trestle-work upon which to lay track for the carrying of such cars, and that such trestle-work was put up and adjusted upon the ground from day to day or from hour to hour as the work progressed and required it by the men or laborers employed upon such job in order to facilitate such work and enable them to do and complete it as designed, and that the defendants furnished to said employés all necessary and sufficient material for the doing of such work and for the constructing and placing in a secure manner of such trestle-work so that it was within their power to use such material for the purposes for which it was furnished from day to day when it was needed

and to make and fasten and use the same in a secure manner, then you are instructed that the defendants would not be responsible for any omission, failure, or neglect on part of their said employés or any of them in and about the use of such materials or in — about the construction and placing or securing of such temporary trestle in the course of their said employment."

6. There also was error in this:

In refusing the following request by defendants to charge the jury, to wit:

70 If you find the facts to be as stated in the last (13th) request, and you further find that the plaintiff and his co-employés were at the time of the accident actually engaged in the erection and placing upon the ground and adjusting a portion of such temporary trestle, and that in so doing they or any of them failed, omitted, or neglected to place or put upon such trestle sufficient bracing or fastening to hold the same up while they were so engaged, by reason of which a portion of said trestle fell, causing injury to the plaintiff, the defendants are not responsible or liable for such injury *not* at all.

7. There was also error in this:

The court should not have submitted to the jury to determine the question as to whether Murdock was the vice-principal of the defendants; in submitting which question and in his charge the court erred in stating to the jury, among other things, the following: The plaintiff claims that he was injured by the negligence of Murdock, who represented the company, in setting him to work upon an insecure and unsafe structure (this trestle), the erection of which Murdock had intrusted to Johnson, an employé; that Johnson was an incompetent person for the work, and that he is entitled to recover for the injuries sustained by reason of that negligence.

The defendants deny that there was any negligence on their part; deny that Murdock, if the injuries resulted from his negligence, was a representative, a vice-principal; also deny that Johnson was an incompetent person within their knowledge, and the defense urged is that if there was any negligence and the plaintiff was injured it was either the negligence of himself or of his co-employés working with him.

The issues as presented by the pleadings affirming and denying the facts as I have stated to you are to be determined upon the evidence which has been introduced tending to support the several claims and the laws as I deem it proper to give you.

* * * * * * *

The burden of proof is upon the plaintiff by a preponderance of the evidence to satisfy you that there was negligence on the part of the defendants or any one who represented them.

* * * * * * *

The claim here, you will recollect, gentlemen, is that this structure which has been exhibited to you in the models was insecure and unsafe, the bents and stringers not properly tied, braced, and bolted so as to render it reasonably safe, and that the defendants, through

Murdock, their representative, as the plaintiff claims, failed to exercise ordinary care and caution in making that trestle-work safe.

* * * * * * *

71 The theory of the plaintiff is that Murdock was a vice-principal—as it is called, a substitute—of the defendant in charge of that work, and that he was not a co-employé, and that the rule which I have laid down to you with reference to the assumption of risk on the part of the plaintiff does not apply to him, for he was not a co-employé of plaintiff.

The duties imposed by law upon defendants, which I have stated to you, with regard to the selection of workmen and a safe structure cannot be delegated by the employer to any one, whether a fellow-employé of the injured party or not, so as to exempt the defendants from all liability for injury sustained by the negligent exercise of these duties.

The duties may be delegated, but if this is done the person to whom they are delegated and to whom the execution of them are intrusted becomes the vice-principal or substitute of the employer, and if he negligently performs them and a workman of the common employment to whom the master owes these duties is injured he has a right of action for damages on that account from the common employer. In other words, the employer is responsible for the negligence of an employé who stands as his direct representative, invested with his own authority over a particular business and over inferior employés, and the latter when injured by such negligence are not barred by the doctrine of fellow-employé, as I have stated it to you.

It is claimed, I say, on the part of the plaintiff, first, that Mr. Murdock was a vice-principal. Now, when can a person be said to be called legally the vice-principal of another so as to make the employer responsible for his acts, his negligent acts?

In this case it is for you to determine whether, as is claimed on the part of the plaintiff, Mr. Murdock was the representative of the defendants, and, if he was, whether the plaintiff has satisfied you by the preponderance of evidence that the injury occurred on account of his negligence.

When a foreman of a gang is vested with the entire management, control, and supervision of a particular work to be done, so as to say not only what shall be done, but how it shall be done, and he has full power and authority to command the men under him in their work and the work is under his practical direction and control, save and except as he may receive directions from time to time from his employer, and ordinarily there is no one else present and authorized to superintend and direct the work of the men, then he represents the employer, he stands for the employer. It is claimed within that principal the foreman, Murdock, was the representative of the defendants; and you will recollect, gentlemen, that testimony had been offered tending to show that Mr. Woods, of the firm
72 of Woods & Lovejoy, one of the defendants here, had the superintendency of this twelve miles, ten or twelve miles, of road which was to be graded and built, and that occasionally from

time to time—according to his own testimony, nearly every day; according to the testimony of others, twice or three times a week—he visited these different gangs of men, at least this gang under the charge of Murdock. Now, in regard to the claim made by plaintiff that Murdock was a vice-principal, if the preponderance of all the evidence satisfies you that the defendants delegated to Murdock, although he is called foreman, the case and management of the work to be performed at this cut and the work to be performed by this gang was under the practical direction and control of Murdock, subject only to the direction given *by* him personally as the local foreman from time to time by the defendant Woods and to the latter's oversight and examination when he occasionally or two or three times a week came to work, and if Murdock had the authority to employ and discharge the men working there in his gang and had direct control over their movements so far as concerned the work in his charge, and that ordinarily there was no one else present and authorized to superintend and direct the work or the laborers when he represented the defendants, "he stood," as was expressed by a distinguished judge, "in their shoes, whether they fit him or not."

And his negligence is so far the defendants' negligence that they are reponsible to the plaintiff on account of it to the extent he was injured in consequence thereof. In other words, if this work requires care and oversight for the proper performance thereof, and the evidence satisfies you that Murdock for that purpose was placed in charge of it and he was clothed with the duty of supervising and managing the work and had the power of control and direction over the gang of men under him, including the plaintiff, in the details of the work, and the plaintiff and others were required to obey his commands, orders, and directions, then, in executing that duty of control, direction, supervision, and management, Murdock represents the defendants, and for his negligence in performance thereof the defendants are liable if his negligence was the proximate cause of the plaintiff's injury, whether he is designated as a foreman, construction boss, or by any other name.

On the other hand, if you should believe from the evidence that Murdock was simply the foreman of the gang in which the plaintiff was employed, both he and plaintiff, as occasion required, working side by side, the foreman merely leading the work and giving immediate direction to it and to the men sometimes in the presence of Mr. Woods, the superintendent, the- Murdock and plaintiff were fellow-employés in a common employment and defendants are not liable or responsible for Murdock's negligence; and if you believe that he was simply a foreman, as I have described to you, then the defendants would be entitled to a verdict
73 in this case unless the plaintiff has proved that the defendants were negligent in the employment of an incompetent servant who built the structure which it is claimed was unsafe, and that his negligence was the proximate cause of his injury.

* * * * * * *

If you find that Murdock was the vice-principal of the defendants and that his negligence was the proximate cause of this injury, then the plaintiff would be entitled to a verdict.

8. There was also an error in this: The court should have granted the defendants' motion to vacate, annul, and set aside the judgment in favor of said plaintiff and against said defendants and the verdict upon which the same was rendered and entered and to grant a new trial of said cause, to the denial of which motion and the ruling of the court thereon defendants' counsel duly excepted.

And the defendants pray that the judgment as aforesaid as rendered against them in said cause for the errors aforesaid and the other many and manifest errors in the said records and proceedings may be reversed, cancelled, and altogether held for naught, and that said defendants be restored to all things which they had lost by occasion of said judgment, and that the order of said district court denying said defendants' motion for a new trial herein be reversed.

Dated July 30th, A. D. 1891.

SHAW & CRAY,
Defendants' Attorneys.

Indorsed: Assignment of errors.

It is hereby stipulated and agreed that the within copies of record may be attached to the return herein by the clerk of the United States circuit court of appeals, eighth circuit, and be printed in the record —.

Dated Oct. 3d, 1891.

WILLARD R. CRAY,
JOHN W. SHAW,
Att'ys for Plaintiffs in Error.
JNO. W. ARCTANDER,
Att'y for Defendant in Error.

United States Circuit Court, District of Minnesota.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods & Lovejoy, Defendants.

To Messrs. Shaw & Cray, attorneys for defendant-.

SIRS: Please take notice that on the 8th day of April, 1891, at 10 o'clock a. m., application will be made to O. B. Hillis, Esq., clerk of said court, at his office, in the custom-house, in the city of 74 St. Paul, in the county of Ramsey and State of Minnesota, to have the within bill of costs and disbursements taxed and inserted in the judgment heretofore entered herein.

Yours respectfully,

ARCTANDER & ARCTANDER,
Attorneys for Plaintiff.

Dated April 6th, 1891.
9—18

In the Circuit Court of the United States for the District of Minnesota.

AUGUST LINDVALL, Plaintiff,
vs.
JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods & Lovejoy, Defendants.

Bill of Costs and Disbursements.

Plaintiff's costs and disbursements.

Docket fee	$20 00
Three affidavits	75
Marshal's fees	4 60
Clerk's fees to be taxed and added	29 95

Witness fees, viz:

June term, 1890.	Names.	Residence.	No. days att'd.	No. miles trav'l'd.	Am't.
June 19 to 21	F. W. Cappellen	Minneapolis	3	24	$5 70
" " "	P. M. Dahl	"	3	24	5 70
" " "	Geo. W. Brown	"	3	24	5 70
" " "	Chas. Stevenson	"	3	24	5 70
" " "	Chas. Stevenson	"	3	24	5 70
" " "	Dr. J. F. Moore	"	3	24	5 70
" " "	Dr. J. H. Dunn	"	3	24	5 70
" " "	Dr. Chas. E. Spratt	"	3	24	5 70
Dec. term, 1890:					
Feb. 2 to 5	John Johnson	"	4	24	7 20
Jan. 31 to Feb. 4	F. W. Cappellen	"	4	24	7 20
" " "	P. M. Dahl	"	4	24	7 20
" " "	Geo. W. Brown	"	4	24	7 20
" " "	Chas. Stevenson	"	4	24	7 20
Jan. 31, Feb. 2 & 3	C. J. Morris	St. Paul	3	2	4 60
Feb. 5	Dr. J. T. Moore	Minneapolis	1	24	2 70
"	D. J. H. Dunn	"	1	24	2 70
"	Dr. C. E. Spratt	"	1	24	2 70
"	E. Munster	St. Paul	1	2	1 60

The above bill of costs and disbursements taxed, allowed at

Total amount	$145 50
Less 20 cents for each Minneapolis witness (15)	3 00
	$142 50

OSCAR B. HILLIS, *Clerk.*

Dated April 8th, 1891.

75 *Affidavit of Disbursements.*

STATE OF MINNESOTA, *County of Hennepin,* } *ss:*

L. Arctander, being duly sworn, says that he is one of the attorneys of the plaintiff in the above-entitled action; that the foregoing

is a true and correct statement of the costs and disbursements of said plaintiff in the above-entitled action, and that all the items thereof have been actually and necessarily paid or incurred therein by and on behalf of said plaintiff, and that each of the above-named witnesses was a material witness for the plaintiff in said action, and that he necessarily traveled the number of miles set opposite his name going from his said place of residence to and returning from the place of trial and necessarily attended the number of days set opposite his name.

LUDWIG ARCTANDER.

Subscribed and sworn to before me this 6th day of April, A. D. 1891.

[SEAL.] JOHN G. ILVOSLEF,
Notary Public, Hennepin Co., Minn.

Indorsed: Filed April 8th, 1891. Oscar B. Hillis, clerk.

UNITED STATES OF AMERICA,
District of Minnesota, Third Division, } *sct:*

I, Oscar B. Hillis, clerk of the circuit court of the United States for the district of Minnesota, do hereby certify that I have carefully compared the foregoing paper-writing with the original thereof, which is in my custody as such clerk, and that such copy is a correct copy of such original and of the whole thereof in the cause therein named.

Seal of United States Circuit Court, District of Minnesota, Third Division.

Witness my hand as clerk and the seal of said court. Done at my office, in Saint Paul, Minnesota, this 3d day of October, A. D. 1891.

OSCAR B. HILLIS, *Clerk,*
By —— ——, *Deputy.*

United States Circuit Court, District of Minnesota, Third Division.

AUGUST LINDVALL, Plaintiff,
vs.
WOODS & LOVEJOY, Defendants.

Certified copy of the bill of costs taxed in said cause. Filed October 5th, 1891.

JOHN D. JORDAN, *Clerk.*

76 UNITED STATES OF AMERICA:

Circuit Court of the United States, District of Minnesota, Third Division.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the honorable the United States circuit court of appeals for the eighth circuit that the foregoing, consisting of 146 pages, numbered consecutively from 1 to 146, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judg-

ment, and all other proceedings in said cause, including the affidavits of Willard R. Cray and John W. Arctander, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation, together with the proof of service thereof.

United States Circuit Court Seal, District of Minnesota, Third Division.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 17th day of August, A. D. 1891.

OSCAR B. HILLIS, *Clerk.*

United States Circuit Court, District of Minnesota, Third Division.

AUGUST LINDVALL
vs.
JOHN WOODS and STEPHEN B. LOVEJOY.

Return to the United States circuit court of appeals for the eighth circuit.

JOHN D. JORDAN, *Clerk.*

Filed August 29, 1891.

77 And on the 29th day of August, 1891, counsel for plaintiffs in error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit an appearance in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

JOHN WOODS and STEPHEN LOVEJOY, Partners as Woods and Lovejoy, Pl'ffs in Error,
vs.
AUGUST LINDVALL, Defendant in Error.
No. 18.

The clerk will enter my appearance as counsel for the plaintiffs in error.

(Signed) JOHN M. SHAW.
WILLARD R. CRAY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 18. John Woods *et al.*, pl'ffs in error, *vs.* August Lindvall, def't in error. Appearance. Filed August 29, 1891. John D. Jordan, clerk. John M. Shaw, Willard R. Cray, counsel for pl'ffs in error.

78 And on the 7th day of September, 1891, counsel for defendant in error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit an appearance in said cause in the words and figures following, to wit:

In United States Circuit Court of Appeals for the 8th Circuit.

AUGUST LINDVALL, Defendant in Error,
vs.
JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods and Lovejoy, Plaintiffs in Error.

The clerk of the above-entitled court will please enter my appearance as counsel for defendant in error in the above-entitled action.

(Signed) JNO. W. ARCTANDER,
101–104 *Rochester Bl'k, Minneapolis, Minnesota.*

(Endorsed:) U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 18. John Woods *et al.*, pl'ffs in error, *vs.* August Lindvall, def't in error. Appearance of counsel for defendant in error. Filed Sep. 7, 1891. John D. Jordan, clerk.

79 And on the 15th day of October, 1891, in the record of the proceedings of said court is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

THURSDAY, *October 15th*, 1891.

Present: Honorable Henry C. Caldwell, circuit judge; Honorable Amos M. Thayer, district judge; Honorable R. R. Nelson, district judge.

JOHN WOODS *et al.*, Pl'ffs in Error,
vs.
AUGUST LINDVALL, Def't in Error. } No. 18.

This cause came on this day to be heard. The plaintiffs in error appear by John M. Shaw, Esq., counsel, and defendant in error by John W. Arctander, counsel.

And the Hon. R. R. Nelson, being disqualified by reason of having sat in the trial of this case in the United States circuit court for the district of Minnesota, retires and the Hon. Moses Hallett sits in the place of the judge so disqualified, and, after hearing a portion of the argument of counsel, the further hearing of this cause was postponed until ten o'clock to-morrow morning.

80 And on the 16th day of October, 1891, in the record of the proceedings in said court is an entry of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

FRIDAY, *October* 16, 1891.

Present: Honorable Henry C. Caldwell, circuit judge; Honorable Amos M. Thayer, district judge; Honorable Moses Hallett, district judge.

JOHN WOODS *et al.*, Pl'ffs in Error,
vs.
AUGUST LINDVALL, Def't in Error. } No. 18.

This cause came on this day to be further heard and was argued in behalf of defendant in error by Mr. John W. Arctander, counsel. Thereupon the cause was submitted to the court upon the record and printed briefs of counsel filed herein.

81 And on the 27th day of October, 1891, an opinion of the court was filed in the clerk's office of said court; which said opinion is in the words and figures following, to wit:

82 United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods & Lovejoy, Plaintiffs in Error,
vs.
AUGUST LINDVALL, Defendant in Error. } No. 18. Error to the Circuit Court for the District of Minnesota.

Mr. John M. Shaw, Mr. Willard R. Cray, counsel for plaintiffs in error; Mr. John W. Arctander, counsel for defendant in error.

Statement.

This action was brought by the defendant in error to recover for a personal injury alleged to have been received through the negligence of the defendants. The issues were a general denial and a plea of former adjudication.

Upon the conclusion of the evidence the defendants moved the court to instruct the jury to return a verdict for the defendants, on the ground that the plaintiff had failed to make out a cause of action against the defendants, which motion was denied. This ruling is assigned for error.

The facts of the case, as disclosed by the bill of exceptions, are in substance as follows:

The plaintiffs in error, who were defendants below, were railroad contractors engaged in the construction of a railroad bed for the St. Paul and Duluth Railroad Company for a distance of some ten or twelve miles.

The work consisted in constructing a road-bed by making cuts in hills and in filling low places. The defendants, about New Year, 1888,

started in on the work at three different places with three separate crews.

One of the crews was under the charge of one Aleck Murdock, and the work by it to be performed was cutting down a hill near Gladstone, Minnesota, and filling a long stretch of low country below said hill. Another crew, under one Woods, a brother of one of the defendants, was at work from the other side of the hill in an opposite direction, and the third crew, a mile or two distant, was under the charge of one Mahoney.

The work in charge of Aleck Murdock was performed as follows: At the base of the hill a trestle-work was erected, consisting of ten trestles, all raised at the same time, built of square timbers and consisting of trestle-bents from two to five feet high, on which were laid stringers. On these stringers were placed ties, to which *was* bolted iron rails, thus constituting a track on which to run out "Petler" dumping cars filled with dirt in the cut, which dirt was dumped at the end nearest the hill until a sufficient fill was produced.

83 The stringers were not in any way fastened to the trestles, nor was there any longitudinal braces between the bents. After the first ten bents had been filled up with dirt the work proceeded in the same manner, except that from that time to the day of the accident only one or two bents were raised at any one time, and as the work progressed the trestle-bents became higher until they, on the day of the accident, were from twenty-one to twenty-four feet high.

There was also this difference, that instead of square timber round timbers were used, about ten to twelve inches at the bottom and seven to eight inches at the top.

The caps of the trestle-bents were also round timbers surfaced on the top for about five inches; these caps were from eight to ten inches through; they were fastened to the legs of the trestle with spikes; at the ends the caps were also surfaced below for about five inches; the distance between the legs at the ground was about thirteen feet; at the top about two feet.

The caps were about six feet long. There was no longitudinal bracing or bracings of any kind between the different trestle-bents, but the legs of each trestle-bent were held together by cross-bracing. On top of the caps *was* placed, at two feet distance from each other, two stringers of 8 x 10 sawed timbers and of different lengths, some 16 feet and some 32 feet. When the 16-feet stringers were used the distance between the trestle-bents was about twelve feet. When the 32-foot stringers were used the distance was about 27 feet. The stringers were not laid so as to buttress one against the other, but so as to overlap one beside the other.

The stringers were not bolted or spiked to the caps, nor were they provided with chucks on either side of the caps, nor were there any bolts driven in them on either side of the caps, nor were they fastened in any way to the trestle-posts, except that the person who had charge of the building of the trestles and their erection, after the first ten trestles had been built, was in the habit of tying with hand a ¾ or 1 inch rope around the stringer and the cap, which

Murdock had observed. He had no orders, either from defendants or from Murdock, to do this. He used no other force except his hands with which to tighten or tie the ropes. On top of these stringers, but not spiked or fastened to them, was then laid ties and rails in the same manner as was done on the first ten trestles erected—the rails spiked to the ties and the rails fish-plated at the end, 30-foot rails, 40 to the foot. At the time of the accident there was a continuous track of about 400 feet from the cut. When the fill was completed the stringers were taken out and used for further trestles and the ties were then made to rest on the dirt. At the time of the accident about 35 or 40 trestle-bents had been erected at this particular place, under the charge of Mr. Murdock, by one Johnson. The men working at this place under Murdock consisted of different sets of men. One set of men, about 20 or 30, worked in the cut, digging out the dirt and filling the cars. One set of men were to drive the teams which hauled the cars from the cut to the dump and back. One set of men, consisting generally of four or five men, worked at the dump or the end of the fill unloading the cars and evening the dirt, shoveling and tamping under the track. One man, Johnson, built the trestles and raised them and put them in position, placed the stringers, and laid on them the ties
84 and track with the assistance of other men furnished him on his request by Murdock. Of all these different men, both those in the cut, on the dump, the teamsters, and the trestle-builder, Murdock had the charge and control. He hired and discharged the men under him, directed the work, how it should be done and when it should be done, ordered the men working under him to go to any different place when he so desired. Nobody else gave any orders to any of the men, and they were all bound to obey his orders and directions. He went from the cut to the dump and on the trestle-work back and forth. He did not work himself, unless to show the men how the work should be done, but occasionally took hold to help the men out. The defendants both resided at Minneapolis, about twenty miles away from the place. During the progress of the work defendant Lovejoy was never there.

Defendant Woods visited the works two or three times a week, but stayed only for a short time; sometimes a few minutes and sometimes an hour or more. He did not give any orders to the workmen nor direct them in any manner. If any orders were given by him they were given by Mr. Murdock. Murdock set Johnson to work to build trestles when the work first commenced, soon after New Year.

The first ten trestles were raised by Murdock with Johnson's assistance. All the subsequent trestles were raised by Johnson on Murdock's orders. The trestle-work was built for temporary purposes, the bents to remain in the fill, but the stringers to be taken out.

Immediately before the commencement of the work at Gladstone, Murdock had had charge of a similar work in Lowry and Douglas hill, in Minneapolis. While working at these hills under Murdock, in the fall and winter before, and shortly before going to Gladstone,

Johnson, who had been working at oiling and fixing cars, was by Murdock set to work building trestles. Before setting him to work Murdock asked him if he was good at bridge-building. Johnson told him he did not understand anything about it at all.

Johnson was not a carpenter. He had not learned the trade of a carpenter. Murdock then set him to work building trestles in Lowry and Douglas hill, where Johnson built altogether six or seven trestles. Johnson had had no experience in trestle-building before the six or seven trestles in Douglas hill, and those he then built *was* all that he had built before, except that he had helped build stable for the horses and camp for the men before he was put to work at building and raising the trestles on the works near Gladstone.

On April —, 1888, plaintiff came out to Gladstone and applied to Murdock for work. Murdock told him that he could go to work on the dump. His duties in working on the dump *was* dumping cars, shoveling dirt, and tamping up the track—that is to say, to fill up dirt under it and under the ties. His duties did not call him any further out on the trestle-work than to the edge of the dump. He worked for defendants from April 2d till April 20th, when injured. He had nothing to do with the building of the trestles or with erecting the trestle-work or with the placing of it in position or in placing the track, and the only assistance he ever gave to this work was one morning a few days after he came to the works, when he, at the request of Johnson, helped to shove out a couple stringers. On the morning of the accident, when the men came to work, there was two trestle-bents standing. The one nearest to the dump was
85 covered with dirt one-half way up the legs, and the dirt ran on a slope from that bent down about one-half way to the next bent. The stringers running from the bent standing one-half way up in the dirt to the bent wholly covered up were 32-foot stringers. The stringers from the bent partly covered with dirt to the bent outside were 16-foot stringers. Johnson helped shoveling on the dump when he had nothing else to do with building or raising trestles. The morning of April 20th Johnson was on the dump with the dump-men filling up dirt under the ties where it had sagged away during the night, when Murdock came down with the men from the cut for the purpose of digging a trench between the two last trestles then standing. There was then four more trestle-bents already built and lying on the ground.

When Murdock came down with his men from the cut in the morning he told Johnson to raise the remaining trestles and put them in position. Johnson, with the assistance of plaintiff and Peterson, then first took out the long stringers lying between the bent entirely covered with dirt and the bent standing in the dirt one-half way up, and in place of these long stringers put in 16-foot stringers, resting with one end on the dirt at the upper end of the dump.

The ropes with which the long stringers were tied to the cap were untied and probably not tied on after the short stringers were put in. He thereafter, while plaintiff remained on the dump leveling

the dirt and filling up under the ties and the track, with the assistance of one Peterson, went to work to raise three more trestle-bents, which was done by aid of block and tackle, one of the teamsters driving his team up the track and thus aiding in raising the trestles. After each trestle was raised Johnson and Peterson laid stringers on them as heretofore described without fastening them in any way whatsoever, unless they were tied with ropes as heretofore described.

The same men thereupon laid the ties and track onto the stringers. The stringers used for the two first trestle-bents erected that morning were short stringers. None of the trestle-bents erected that morning were provided with longitudinal bracing, nor were there any chucks on the stringers or any bolts on either side of the cap, nor were the stringers bolted or nailed to the caps, nor were the ties bolted or nailed to the stringers.

All of the trestle-bents erected that morning were leaning in toward the dump, the one farthest from the dump about eight inches or one foot; the next one about the same; the next one about one foot and a half, and the next one about two feet or two feet and a half. Johnson cannot remember whether any of the stringers on the trestle-bents erected that morning were tied with ropes, but plaintiff saw ropes tied on one or two pairs of them on one side when he went out with the stringers, as hereinafter stated.

At this time there was then five trestle-bents standing, one of which was covered with dirt one-half way up and all the other wholly uncovered. None of the trestle-bents were provided with footings, nor were they dug into the ground, but were placed on top of the ground, except one, one leg whereof, on account of a slant in the ground, was partly dug in. There was then only the sixth trestle left on the ground. Johnson placed the lower part of
86 this trestle about twenty-two or twenty-four feet away from the last trestle standing; placed sticks in front of the legs and fastened the rope and tackle in the cap which was lying farthest away from the trestle-work, and caused it to be raised in this way by aid of horse-power, having first secured the cap with a guy rope to a stick placed some distance ahead.

This last trestle was heavier than the others and was provided with a footing. Up to this time the plaintiff had taken no part in the work of building or placing in position the trestles which were erected that morning, nor in shoving out stringers on them, nor in having the ties or track on them, but had been busy at the dump shoveling and tamping and had paid no attention to the work on the trestle beyond him. About this time Murdock, whose crew from the cut had got through digging the trench and who had taken his men back into the cut, came down on the dump where plaintiff and Peterson were then standing shoveling. The long stringer which Johnson had taken out at the end of the dump was then lying beside the track on the dump. On the track beside these stringers were lying a couple of rollers. On going down Mr. Murdock ordered plaintiff to take hold of those stringers and help to shove them out, so as to get the stringers out before the cars should

come down with the dirt. Charlie Peterson and plaintiff then took hold and lifted the stringers upon the rollers laying on the track, and plaintiff and Peterson commenced to shove the stringers on the rollers, Mr. Murdock assisting them until the last roller was passed, when one of them took and placed it in front, and thus the work of shoving them out proceeded. The track was laid only one-half way out between the two last bents standing and on which stringers were laid, and as the front roller dropped from the track down onto the stringers Mr. Johnson came up on the trestle-work. At the same time a car came down from the cut and Mr. Murdock went back towards it, while Johnson took his place, and the work of shoving the stringers out proceeded until the front rollers struck the rope with which the stringers already laid was tied to the cap of the last bent standing. The stringers moved were then so far out that they were about to tip for the men. Johnson then called Murdock, telling him that the stringers were going to tip and that he had better come out and help them. Murdock came out and took hold and told Peterson to go and get a piece of rope, which he did, and Murdock then tied the rope around the stringers which they were shoving out and put one end of the rope around the end of the stringers lying in position and made it tight, so they could hold them, and then ordered Johnson to go down on the ground and loosen the guy rope and let the sixth trestle come in a little. Johnson did so. At this time the hind end of the stringers which were being moved had left the track, and plaintiff knelt down on the stringers and held down the end of one of the stringers with both his hands, while Murdock had hold of the rope. After Johnson had got down on the ground and loosened the guy rope and let the bent down a little Murdock asked if it was far enough in, to which Johnson answered yes, and he tied the guy rope. Mr. Murdock then eased up on the rope so as to let the stringers down onto the cap of the bent then about to be raised, and just as the stringers touched the cap the whole trestle-work fell down in towards the dump, the only trestle remaining standing being the sixth one, which was held up by the guy rope and the trestle which stood partly buried in the dirt, and perhaps the one nearest beyond this. The fall was
87 not occasioned by the breaking of any portion of the appliances; nothing broke. When the trestle-work fell down to the ground plaintiff fell with it and was injured.

Plaintiff had seen parties raising the trestle that morning, but did not notice how they were built. He had never worked on trestle-work before and had no knowledge of how such work should properly be built or secured in order to make it safe, nor had he any knowledge of whether any longitudinal or other bracing or any fastenings other than what was used at the place was necessary in order to make the trestle-work safe to go out on. He did not know and could not see from the place where he was working whether or how the trestles were braced or how they were secured; but the trestles were in sight from the dump where he was working from the time he commenced to work. He had no knowledge of the trestles erected that morning leaning in towards the dump. He did

not know Johnson before he was working out there except while working at Douglass hill, in the city of Minneapolis; knew nothing about his want of experience in building trestles; did not know he was not a trestle-builder or a carpenter, but knew in a general way what he was doing at the works. When the trestle-work which fell down was again erected by the defendants longitudinal bracing between the different bents were used.

There was at the place where the trestle-work was being built sufficient materials of all kinds for the work and for the bracings and sufficient of bolts, nails, and spikes of all sizes] and sufficient tools and implements for the work.

Plaintiff introduced testimony by four civil engineers, who were graduates as such and who had had large experience in bridge-building and trestle-building, tending to show that the trestle-work in question, even supposing the stringers had been tied with ropes to the caps of the different bents, was unsafe to send people to work upon pushing out stringers of the length and dimensions testified to, and that in order to make the structure reasonably safe the stringers should either have been bolted to the caps or a plank should have been bolted to the stringers on each side of the cap, thus making a chuck, commonly called, or else spikes should have been placed in the stringers below on each side of the cap or else there should have been provided longitudinal bracing between the different bents.

The defendants' evidence tended to show that the fall of the trestle was not occasioned by the breaking of the structure or any part of it or any of the appliances.

Nothing broke; the fall was occasioned while Murdock, plaintiff and Peterson were endeavoring to extend the last pair of stringers to the bent which Johnson had just tied with the guy lines.

That the men were under no stress for time within which to put up this temporary trestle.

That the defendant John Woods attended to the outside work of the defendants at and during all the time mentioned, and retained and conducted the supervision of the work in person, and was at this point and the other points where the other crews were at work, viz., the crews under Mahoney and under Frank Woods, as a rule, every week day or at least five times a week, and gave directions and made suggestions to the foremen themselves.

88 That the foremen, including the foreman Murdock, had the privilege of setting men to work if any should apply and there was a place for them on the work, or, if it became necessary for any reason, he could give them a bill of their time and send them to the defendant- for their pay, which was equivalent to a discharge.

That beyond this he had no power in the hiring or discharging of any man; that he did not fix the wages of any man; that he simply did the work of any foreman on the work; kept the time of the men and saw that they were about their work and doing what they were employed to do; that he took hold with the men whenever and wherever occasion presented itself and when his assistance

was required in assisting the men in doing what they were engaged upon.

That he did not employ the plaintiff beyond telling him when he applied to him that morning of the 2d of April that he could go down on the dump to work with Johnson; that at the time of the accident it appeared by the defendants' testimony that the plaintiff was upon this temporary trestle, as were also Charlie Peterson and the man Johnson, when he, Murdock, was called by Johnson and went out there to help hold the stringers.

That no express directions were given to plaintiff or to either of the men to go out on the structure.

Plaintiff, Johnson, and Peterson performed this work in this way as a part of the work in constructing the road; that the trestle was a temporary trestle only, and was only to run out empty Petler cars on, carrying a cubic yard of dirt, after they were dumped.

The trestle-bents were left in the fill. It also appeared by the defendants' evidence that the defendants at all times furnished and provided sufficient of all kinds of tools and implements and material for the work, and the defendants Woods and Mr. Murdock told the men and told the plaintiff to be careful to avoid accidents. Several witnesses also testified on behalf of the defendants as experts to the effect that the structure as described was a reasonable safe place and structure for the purpose for which it was constructed if tied with ropes around the stringers to the caps.

The defendants also showed that the man Johnson did his work well, and, after being shown how to put up and build temporary trestle on Lowry hill and Douglas hill, had always built the temporary trestles and performed his work well; that the foreman Murdock performed his duties and did his work well.

To support their plea of a former adjudication the defendants offered in evidence a duly certified record, which showed the following facts:

That the same plaintiff had brought an action against the same defendants upon exactly the same cause, for the same injury, in the district court of the State of Minnesota for the county of Hennepin, a court of general jurisdiction in said State.

That upon the trial of said cause in said district court, after the plaintiff had put in all his evidence and rested his case, the defendant- moved said district court to dismiss said action upon the ground that the evidence of plaintiff did not make out a case against said defendants, which motion was granted and said action was dismissed.

89 That thereupon the plaintiff procured a stay of proceedings and made up and procured to be settled and signed by the judge who tried the case a settled case and exceptions containing all the evidence, and upon the pleadings and such settled case made a motion for a new trial in said district court; that said motion for a new trial was denied.

That thereupon said plaintiff, under the practice and procedure in the Minnesota courts in such cases, appealed to the supreme court of Minnesota from said order denying the motion for a new trial, and

carried to the supreme court upon such appeal the pleadings and all the evidence given in the court below.

That the case upon said appeal was duly heard and tried in said supreme court, and the decision and order of said district court was in all things affirmed.

That thereupon a mandate issued from said supreme court to said district court for further proceedings in accordance with such decision, and upon the filing of said mandate judgment in said cause was given and entered in said district court "that said action be, and is hereby, dismissed."

The court below excluded this record, and that ruling is assigned for error. The opinion of the circuit court on this question is reported, 47 Fed. Rep., 195.

The Minnesota statute upon the subject of the dismissal of actions is as follows:

"SEC. 262. Dismissal of action.—The action may be dismissed without a final determination of its merits in the following cases:

First. By the plaintiff himself at any time before trial if a provisional remedy has not been allowed or counter-claim made.

Second. By either party with the written consent of the other or by the court upon the application of either party after notice to the other and sufficient cause shown at any time before the trial.

Third. By the court where, upon the trial and before the final submission of the case, the plaintiff abandons it or fails to substantiate or establish his claim or cause of action or right to recovery.

Fourth. By the court when the plaintiff fails to appear on the trial and the defendant appears and asks for the dismissal.

Fifth. By the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.

All other modes of dismissing an action by nonsuit or otherwise are abolished. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register and a notice served on the adverse party. Judgment may thereupon be entered accordingly.

SEC. 263. Judgment on the merits.—In every case other than those mentioned in the last section the judgment shall be rendered on the merits."

CALDWELL, *J.*:

The effect of the judgment of the State court dismissing, on the defendants' motion, the action brought in that court at the conclusion of the plaintiff's testimony, upon the ground that the plaintiff had failed to make out a case, is a question of local law depending on the construction of a statute of the State.

90 It appears from the latest adjudged cases to be the established doctrine of the supreme court of Minnesota that, under the statute of that State, upon a dismissal of the action when the plaintiff rests his case on the motion of the defendant, upon the ground that the plaintiff has failed to establish a cause of action, the

proper judgment to render is one of dismissal merely, such as was rendered in this case. That court holds that such a judgment is not a judgment upon the merits of the action such as will bar the plaintiff from maintaining another suit for the same cause, but that it is in effect nothing more than a common-law or voluntary non-suit.

Craver *vs.* Christian, 34 Minn., 397.
Andrews *vs.* School District, 35 Minn., 70.
Conrad *vs.* Baldwin, 44 Minn., 406.

The construction placed on the State statute by the supreme court of the State will be followed by this court.

The record of the judgment of dismissal constitutes no bar to this action, and it was rightly excluded.

Did the court err in refusing to instruct the jury at the close of the evidence to return a verdict for the defendants?

The solution of this question involves the application of the law to the facts of the case.

There is no room for controversy over the material facts upon which the case must turn. They are very fully set out in the statement of the case.

There was abundant evidence to warrant the jury in finding that the trestle was constructed without a due regard for the safety of those who were to work upon it.

It was not braced between the trestle legs; the stringers laid on top were not spiked to the caps of the bents; the ties and track laid on the stringers were not spiked to the stringers; there were no chucks on the stringers on either side of the caps nor any bolts driven into them on either side of the caps.

The evidence shows that the doing of one or more of these things was necessary to render the structure reasonably safe and secure. The only means used to hold it together was a rope tied by hand around the stringers and the caps at each trestle-bent.

It is not claimed that the plaintiff was guilty of contributory negligence, or that he constructed or assisted in constructing the bents or trestles. He was employed by Murdock to work on the dump—that is, to dump cars, shovel dirt, and tamp the track; but Murdock could assign him to do any other work, and did require him to assist in raising trestle-bents when his services were necessary, and he was on the trestle by Murdock's order, assisting in raising a trestle-bent, when, without any fault or negligence on his part, the trestle upon which he was at work, by reason of its imperfect construction, fell and injured him.

Are the plaintiffs in error chargeable with this faulty construction of the trestle and liable to the defendant in error for the injury he sustained by reason thereof?

If this trestle had been erected under the immediate personal supervision and direction of the plaintiffs in error it is clear they would be liable; but instead of supervising and directing the work in person they delegated this power and duty to Murdock,
91 and it is said Murdock and the plaintiff are fellow-servants,

and that the rule which precludes a servant from recovering from his master for an injury received through the negligence of a fellow-servant is applicable to this case.

The proper construction of this trestle was a work that required more mechanical skill, judgment, and experience than is commonly possessed by the ordinary laborer, and the plaintiffs in error recognized this fact.

They appointed a foreman to superintend, direct, and control the work.

Murdock was entrusted with full control of the construction work on the section of the railroad embracing this trestle. He had authority to direct all the men on that section—between thirty or forty in number—when to work, where to work, and how to work, and it was their duty to obey his orders. He superintended and supervised all the work on the section and hired and discharged workmen at his discretion.

In these respects he was invested with all the power and authority his principals possessed.

He did not ordinarily do manual labor. His chief duty was to personally supervise the work, including the building of the trestle, and to give directions how all parts of the same should be done. He went back and forth between the places where the different crews were at work on the section, directing and instructing and occasionally assisting each of them in the work they were doing. Johnson, who framed the bents and put up the trestle, worked in obedience to his orders, as well as the other men.

As the plaintifls assumed through Murdock the superintendence and control of the construction of the trestle, they were bound to exercise ordinary care to make it reasonably safe and secure for those called to do work upon it.

In the discharge of this duty Murdock occupied the place of the plaintiffs in error, and any failure on his part to exercise ordinary care in the discharge of this duty is imputable to them.

Whether the trestle was one of those structures the building of which the master might have committed to ordinary fellow-laborers without any instructions or superintending care by simply providing them with adequate materials and tools to do the work need not be discussed.

The plaintiffs in error did not attempt to build the trestle in any such way.

They did not leave the mode and manner of its construction to the discretion or judgment of the laborers doing the work, but they constituted Murdock their representative and imposed on him the duty and conferred on him the authority to supervise, direct, and control its construction and required the laborers to obey his orders and directions in the premises.

Under these circumstances Murdock did not sustain the relation of a fellow-servant to the defendant in error in respect to this work.

He stood in the shoes of his employers and was their representative, and they are responsible for the results of his negligence in the work so committed to his direction, supervision, and control.

92 This is the doctrine of the Supreme Court of the United States. (Chicago, M. & St. P. R'y Co. *vs.* Ross, 112 U. S., 377.; Northern Pacific R. R. Co. *vs.* Herbert, 116 U. S., 642.)

And is the rule laid down in this circuit (Borgman *vs.* Omaha & St. L. R'y Co., 41 Fed. Rep., 667) and by the courts of last resort in many of the States, and is appropriately denominated the "American rule."

Sherman and Redfield on Negligence, 4th ed., sections 226–228.

This court unanimously approved and applied the rule in the case of Atchison, Topeka and Santa Fé R. R. Co. *vs.* Wilson, decided at the present term.

The reasons in support of the rule are forcibly and convincingly stated in the authorities we have cited and need not be repeated here. In our judgment the rule is right in principle and is supported by the weight of authority.

There was abundant evidence to warrant the jury in finding that Murdock did not exercise ordinary skill and care in supervising and directing the construction of the trestle, and that by reason of this negligence on his part the trestle was so defectively and imperfectly constructed that it fell and injured the defendant in error.

This disposes of the 1st, 2d, and 3d assignments of error.

According to the view we have taken of the case, the court below properly modified the 3d request to charge and properly refused the 13th and 14th requests.

The 4th, 5th, and 6th assignments of error are therefore untenable. In the 7th assignment complaint is made of the action of the court in leaving the jury to determine whether Murdock and Lindvall were fellow-servants, but as that isssue was, in our opinion, rightly determined by the jury and submitted to them under proper directions, the 7th assignment of error is untenable.

The judgment of the court below is affirmed. Hallet, judge, dissents.

Heard before Judges Caldwell, Hallet, and Thayer.

Attest: JOHN D. JORDAN, *Clerk.*

93 And, on the 27th day of October, 1891, in the record of the proceeding in said court, is an entry of final judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, October Term, 1891.

TUESDAY, *October* 27, 1891.

Present: Honorable Henry C. Caldwell, circuit judge; Honorable Amos M. Thayer, district judge.

JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods and Lovejoy, Plaintiffs in Error,
vs.
AUGUST LINDVALL, Defendant in Error. } No. 18.

In errror to the circuit court of the United States for the district of Minnesota.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Minnesota and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the defendant, August Lindvall, recover against the said plaintiffs, John Woods and Stephen B. Lovejoy, partners as Woods and Lovejoy, twenty dollars for his cost herein expended and have execution therefor.

(Signed) HENRY C. CALDWELL,
Circuit Judge.

October 27, 1891.

94 And on the 27th day of November, 1891, an order staying issuance of mandate was filed in the clerk's office of said court; which said order is in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods and Lovejoy, Plaintiffs in Error,
vs.
AUGUST LINDVALL, Defendant in Error. } No. 18. Order.

Ordered, on the application of counsel for plaintiffs in error, that the issuance of the mandate herein be stayed for a period of thirty days from this date to enable the said plaintiffs in error to make application to the Supreme Court of the United States for a writ of certiorari in this cause.

(Signed) AMOS M. THAYER, *Judge.*

Nov. 27, 1891.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. 1891, October term. No. 18. John Woods *et al.*, pl'ffs in error, *vs.* August

Lindvall, def't in error. Order staying issuance of mandate for thirty days from Nov. 27, 1891. Filed Nov. 27, 1891. John D. Jordan, clerk.

95 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing ninety-four pages, numbered from one to ninety-four, inclusive, contains a true copy of all the pleadings and proceedings, except the proceedings on the motions of the defendant in error to dismiss the writ of error and the motion to strike the bill of exceptions from record, in the case of John Woods and Stephen B. Lovejoy, partners as Woods and Lovejoy, plaintiffs in error, *vs.* August Lindvall, defendant in error, No. 18, October term, 1891, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this fifteenth day — December, A. D. 1891.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

96 United States Circuit Court of Appeals, Eighth Circuit.

JOHN WOODS and STEPHEN B. LOVEJOY, Partners as Woods and Lovejoy, Plaintiffs in Error,
vs.
AUGUST LINDVALL, Defendant in error.
} No. 18.

In this cause it appearing that it will be impracticable to submit the application for a writ of certiorari to the Supreme Court of the United States within the time fixed by the order made herein on the 27th day of November, 1891, it is therefore ordered, upon the application of counsel for the plaintiffs in error, that the issuance of the mandate herein be further stayed for a period of thirty days in addition to the time granted in the former order.

December 18, 1891.

(Signed) AMOS M. THAYER, *Judge.*

(Endorsed :) U. S. circuit court of appeals, eighth circuit. No. 18. 1891, October term. John Woods *et al.*, pl'ffs in error, *vs.* August Lindvall, def't in error. Order granting further time to make application for writ of certiorari Filed Dec. 18, 1891. John D. Jordan, clerk.

97 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals, eighth circuit, do hereby certify that the foregoing one page,

numbered from — to —, inclusive, contains a true copy of the order granting further time to make application for writ of certiorari and staying issuance of mandate in the case of John Woods and Stephen B. Lovejoy, partners as Woods & Lovejoy, plaintiffs in error, *vs.* August Lindvall, defendant in error, No. 18, October term, 1891, as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this 22nd day — December, A. D. 1891.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.